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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. form	RE: Draft Questionnaire (20 pages)	n.d.	P2, P6/b(6)
002. form	RE: Financial Statement (4 pages)	02/27/1997	P6/b(6)
003. form	RE: Financial Statement (2 pages)	n.d.	P6/b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12690

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Forms [6]

2009-1007-F
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RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.
PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).
RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

b(1) National security classified information [(b)(1) of the FOIA]
b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

Withdrawal/Redaction Marker
Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. form	RE: Draft Questionnaire (20 pages)	n.d.	P2, P6/b(6)

COLLECTION:
Clinton Presidential Records
Counsel's Office
Doug Band
OA/Box Number: 12690

FOLDER TITLE:
Forms [6]

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db1210

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

P1 National Security Classified Information [(a)(1) of the PRA]
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Freedom of Information Act - [5 U.S.C. 552(b)]

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b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

ADDENDUM TO SENATE QUESTIONNAIRE

Question 15:

(1) Ten Most Significant Written Opinions

United States v. The Spy Factory et al., --- F. Supp. ---, 1997 WL 7582 (S.D.N.Y. 1997).

Krueger Int'l v. Nightingale, Inc., 915 F. Supp. 595 (S.D.N.Y. 1996).

United States v. Lech, 895 F. Supp. 586 (S.D.N.Y. 1995).

Silverman v. Major League Baseball Player Relations Committee, 880 F. Supp. 246 (S.D.N.Y. 1995), aff'd, 67 F.3d 1054 (2d Cir. 1995).

Refac Int'l, Ltd. v. Lotus Development Corp., 887 F. Supp. 539 (S.D.N.Y. 1995), aff'd, 81 F.3d 1576 (Fed. Cir. 1996).

Azurite Corp., Ltd. v. Amster & Co., 844 F. Supp. 929 (S.D.N.Y. 1994), aff'd, 52 F.3d 15 (2d Cir. 1995).

United States v. Hendrickson, 26 F.3d 321 (2d Cir. 1994) (sitting by designation).

Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994).

In re: Arbitration between Coastal Shipping, Ltd. and Southern Petroleum Tankers, Ltd., 812 F. Supp. 396 (S.D.N.Y. 1993).

Flamer v. City of White Plains, 841 F. Supp. 1365 (S.D.N.Y. 1993).

(2) Appellate Reversals and Significant Criticisms

Runquist v. Delta Capital Management, L.P., 1994 WL 62965 (S.D.N.Y.), rev'd, 48 F.3d 1212 (2d Cir. 1994).

The Second Circuit reversed a decision in which I adopted a Magistrate Judge's recommendation that plaintiff's claims of securities fraud be dismissed. Before the Magistrate Judge, plaintiff failed to file a timely opposition to defendant's motion for summary judgment, and subsequently filed an affidavit which the Magistrate Judge found insufficient to raise a triable issue of fact as to reliance. The Second

Circuit found, however, that the affidavit was sufficient to raise an issue of material fact, and that it was error for me to have dismissed plaintiff's remaining claims on the basis of his attorney's repeated noncompliance with applicable filing procedures and deadlines.

Bolt Electric, Inc. v. City of New York, 1994 WL 97048 (S.D.N.Y. 1994), rev'd, 53 F.3d 465 (2d Cir. 1995).

I granted a motion to dismiss on behalf of the City of New York in a breach of contract action brought by Bolt Electric, Inc. I found that because the City had undertaken to pay Bolt for general contracting services pursuant to a letter which was not filed and endorsed by the City's Comptroller, as required under New York's Administrative Code, the contract was unenforceable. The Second Circuit reversed, reasoning that compliance with the endorsement provision of the Administrative Code was not a mandatory precondition to the formation of a valid contract. In the alternative, the Court reasoned that, even if the contract was executed without proper authority, it was enforceable because the City had funds available for performance.

Bernard v. Las Americas Communications, Inc., (no written opinion), aff'd in part, vacated in part, 84 F.3d 103 (2d Cir. 1996).

Pursuant to a jury verdict, I entered judgment in favor of plaintiff, an attorney, seeking legal fees in connection with his representation of defendant in proceedings before the Federal Communications Commission. Applying Washington, D.C. law, the Second Circuit approved of my jury instructions on the issues of proximate causation and damages, but found error with respect to my instruction on materiality. Specifically, I had instructed that a material breach "defeats the purpose of [an] entire transaction"; the Circuit held that D.C. law requires only that defendant prove that he received "something substantially less or different from that for which he bargained." 84 F.3d at 109 (citations omitted). On remand, the jury again found for plaintiff, and judgment was entered accordingly.

Aurora Maritime Co., Ltd. v. Abdullah Mohamed Fahem & Co., 890 F. Supp. 322 (S.D.N.Y. 1995), aff'd on other grounds, 85 F.3d 44 (2d Cir. 1996).

The Second Circuit affirmed my decision denying a bank's motion to vacate

various Supplemental Admiralty Rule B attachments of plaintiff's bank account. I held that "because plaintiffs obtained Rule B attachments before [the bank] exercised its set-off rights . . . plaintiffs gained a limited property interest under federal law that cannot be defeated by a subsequently executed state law set-off right." Though upholding my ruling, the Second Circuit disagreed with my conclusion "that [the bank's] set-off right and appellees' Rule B attachments d[id] not conflict." Instead, the Second Circuit reached the constitutional issue and found that the dismissal was proper because federal law preempted the bank's right, under Section 151 of state law, to the funds in the disputed account.

European American Bank v. Benedict, 1995 WL 422089 (S.D.N.Y. 1995), vacated, 90 F.3d 50 (2d Cir. 1996).

I affirmed a Bankruptcy Court decision rescinding its prior order extending the time period for a creditor to file a dischargeability complaint. I reasoned that the Bankruptcy Court did not have the discretion, under the applicable statute of limitations, to extend the appropriate time for filing a complaint, and that the Court was therefore correct when it reversed its initial decision to do so. Recognizing a split of authority on the issue, the Second Circuit determined that the applicable limitations period under the Federal Bankruptcy Rules is not jurisdictional, and that it is therefore subject to waiver, estoppel, and equitable tolling. The Circuit proceeded to enforce the Bankruptcy Court's initial decision to extend the period for filing, because the debtor had waived its right to object to the extension by failing to raise that objection prior to the expiration of the statutory deadline.

Hellenic American Neighborhood Action Committee v. City of New York, 933 F. Supp. 286 (S.D.N.Y.), rev'd, 101 F.3d 877 (2d Cir. 1996).

I granted a preliminary injunction on behalf of a contractor which alleged that it was barred from city procurements in violation of its due process rights under the 14th Amendment. The Second Circuit reversed without addressing whether the City's alleged misconduct deprived plaintiff of protected property and liberty interests. The Circuit reasoned that even if there was such a deprivation, there was no failure of due process because there was an adequate remedy available to the contractor under state law.

(3) Significant Opinions on Federal or State Constitutional Issues

United States v. Ni Fi Yi, --- F. Supp. ---, 1997 WL 7672 (S.D.N.Y. 1997).

National Helicopter Corp. of America v. City of New York, --- F. Supp. ---, 1997 WL 32261 (S.D.N.Y. 1997).

United States v. The Spy Factory et al., --- F. Supp. ---, 1997 WL 7582 (S.D.N.Y. 1997).

In re St. Johnsbury Trucking Co., Inc., 191 B.R. 22 (S.D.N.Y. 1996).

Hellenic American Neighborhood Action Committee v. City of New York, 933 F. Supp. 286 (S.D.N.Y. 1996), rev'd, 101 F.3d 877 (2d Cir. 1996).

United States v. Jimenez, 921 F. Supp. 1054 (S.D.N.Y. 1995).

Lee v. Coughlin, 902 F. Supp. 424 (S.D.N.Y. 1995).

Campos v. Coughlin, 854 F. Supp. 194 (S.D.N.Y. 1994) (cited with approval in Jolly v. Coughlin, 76 F.3d 468 (2d Cir. 1996).

Flamer v. City of White Plains, 841 F. Supp. 1365 (S.D.N.Y. 1993).

Fisher Scientific v. City of New York, 812 F. Supp. 22 (S.D.N.Y. 1993).

QUESTION 18:

A1.

Case Name: Fratello Lozza (USA) v. Lozza (USA) & Lozza SpA

Court: United States District Court, Southern District of New York

Index No.: 90 Civ. 4170

Judge: Then District Court Judge Fred I. Parker (sitting by designation)
Federal Building
11 Elmwood Avenue
P.O. Box 392
Burlington, Vermont 054-0392
(802) 951-6401

Date of Trial: March 16, 1992

Adversaries: Charles E. Tenko
Tenko & Tenko
19 West 44th Street
New York, New York 10036
(212) 840-2178

Case Description: Represented Lozza (USA) and Lozza SpA, Inc. in this trademark infringement and unfair competition action. I conducted the trial on behalf of the defendants and secured a dismissal of plaintiff's claims and an injunction against plaintiff's use of defendants' marks. Findings of Fact and Conclusions of Law and Order reported at 789 F. Supp. 625 (S.D.N.Y. 1992).

A2.

Administrative Case Name: Ferrari of Sacramento, Inc. v. Ferrari North America

Agency: State of California New Motor Vehicle Board
(Appeared pro hac vice)

Protest No.: PR-973-88

Administrative Law Judges:

Robert S. Kendell
Marilyn Wong
c/o New Motor Vehicle Board
1507 21st Street, Room 330
Sacramento, California 95814
(916) 445-1888

Dates of Hearing: 10/16/90, 10/17/90, 10/31/90, 11/1/90, and 11/2/90

Co-Counsel:

Nicholas Browning, III, Esq.
Herzfeld & Rubin
1925 Century Park East, Suite 600
Los Angeles, California 90067-2783
(213) 553-0451

Adversaries:

Jay-Allen Eisen
Jay-Allen Eisen Law Corporation
1000 G Street, Suite 300
Sacramento, California 95814
(916) 444-6171

Donald M. Licker, Esq.
701 University Avenue, Suite 100
Sacramento, California 95825
(916) 924-9600

Case Description: Represented Ferrari North America in an administrative hearing, ordered pursuant to a writ of mandate, of dealer's petition challenging the termination of his Ferrari franchise under California's Automobile Franchise Law. I had primary responsibility for conducting the hearing before the California Board which confirmed the termination.

Ferrari North America appealed the judgement on the writ, which judgment was reversed on appeal in an unpublished opinion. The appeal addressed the issue whether a Stipulation of Settlement entered into before the California New Motor Vehicle Board could be enforced, without a hearing, to terminate a dealer.

Although not listed as co-counsel for appellant's briefs, I had significant drafting input. The appellate case was entitled Ferrari of Sacramento, Inc., Respondent v. New Motor Vehicle Board and Sam Jennings as Secretary,

Appellants, and Ferrari North America, Real Party in Interest and Appellant; No. C008840 in the Court of Appeal of the State of California in and for the 3rd Appellate District; Sacramento Superior Court, Case No. 360734.

A3.

Case Name: Van Ness Auto Plaza, Inc., a California Corporation, d/b/a Auto Plaza Lincoln Mercury, Auto Plaza Porsche and Auto Plaza Ferrari, Debtors.

Court: United States Bankruptcy Court, Northern District of California

Case No.: 3-89-03450-TC

Judge: Hon. Thomas E. Carlson
U.S. Bankruptcy Court Judge
450 Golden Gate Avenue
San Francisco, California 94102
(415) 556-2250

Dates of Hearing: 1/22/90 and 3/19/90

Co-Counsel: Nicholas Browning, III, Esq.
Herzfeld & Rubin
1925 Century Park East, Suite 600
Los Angeles, California 90067-2783
(213) 553-0451

Adversaries: Henry Cohen, Esq.
Cohen and Jacobson
Attorneys for Debtor
577 Airport Blvd., Suite 230
Burlington, California 90067-2783
(415) 342-6601

William Kelly, Esq.
Graham & James
Attorneys for Buyer, Barry Singh
One Maritime Plaza, Suite 300
San Francisco, California 94111
(415) 954-0200

Case Description: Represented, pro hac vice, Ferrari North America, a franchisor of bankrupt dealer, in hearings related to Ferrari's opposition to the rejection of customer contracts, assumption of the dealer's franchise agreement and confirmation of the proposed sale of dealer's franchise. The Court ruled that the dealer could not reject customer contracts, although financially burdensome, and then assume franchise agreement.

Case subsequently settled with sale of dealership and resolution of claims among dealer, new buyer, Ferrari and customers.

A4 - A5

General Description: Since 1985, my firm represented Fendi S.a.s. di Paola Fendi e Sorelle ("Fendi") in its national anti-counterfeiting work. Frances B. Bernstein, a deceased partner of Pavia & Harcourt, and I created Fendi's anti-counterfeiting program. From 1988 until the time I left the firm for the bench, I was the partner in charge of that program. I handled almost all discovery work and substantive court appearances in cases involving Fendi. The following are cases representative of various facets of this work.

A4.

Case Name: Jane Doe v. John Doe and Various ABC Companies

Case No.: 89 Civ. 3122

Court: United States District Court, Southern District of New York

Judge: Hon. Thomas P. Griesa
U.S. District Judge
U.S. Courthouse
500 Pearl Street
New York, New York 10007
(212) 805-0210

Adversaries: None appeared.

Dates of Hearings: Multiple appearances from 1989 to 1992.

Case Description: Provisional relief appearances relating to Lanham Act claims against street vendors of counterfeit goods.

OR:

Case Name: Fendi S.a.s. Di Paola Fendi e Sorelle v. Dapper Dan's Boutique et al.

Case No.: 89 Civ. 0477

Court: United States District Court, Southern District of New York

Judge: Hon. Miriam G. Cedarbaum
U.S. District Judge
U.S. Courthouse
500 Pearl Street
New York, New York 10007
(212) 805-0198

Adversary: Defendant appeared pro se and then defaulted.

Dates of Hearings: 1/23/89 and 2/17/89

Case Description: Appearances relating to temporary restraining order, preliminary injunction and seizure order under the Lanham Act, and granting of a default judgment.

A5.

Case Name: Fendi S.a.s. di Paola Fendi e Sorelle v. Burlington Coat Factory Warehouse Corp., et al.

Case No.: 86 Civ. 0671

Court: United States District Court, Southern District of New York

Judge: Hon. Leonard B. Sand
U.S. District Judge
U.S. Courthouse
500 Pearl Street
New York, New York 10007
(212) 805-0244

Adversaries: Stacy J. Haigney, Esq.
Herbert S. Kasner, Esq.
Attorneys for Burlington Coat Factory Warehouse and

Monroe G. Milstein
Burlington Coat Factory Warehouse, Corp.
263 West 38th Street
New York, New York 10018
(212) 221-0010

Dennis C. Kreiger, Esq.
Cuddy & Fedder
Attorneys for Firestone Mills, Inc. and Leo Freund
90 Maples Avenue
White Plains, New York 10601
(914) 761-1300

Dates of Trial: 5/18/87 to 5/19/87

Case Description: Lanham Act trademark infringement claim which settled during trial.

A6.

Case Name: Fendi S.a.s. di Paola Fendi e Sorelle v. Cosmetic World, Ltd., Loradan Imports, Inc., Linea Prima, Inc. a/k/a Lina Garbo Shoes, Daniel Bensoul, Michael Bensoul a/k/a Nathan Bendel, Paolo Vincelli and Mario Vincelli

Case No.: 85 Civ. 9666

Court: United States District Court, Southern District of New York

Judges: Hon. Leonard B. Sand
U.S. District Judge
U.S. Courthouse
500 Pearl Street
New York, New York 10007
(212).805-0244

Hon. Joel J. Tyler
Magistrate Judge, U.S. District Court
Home address:
2 Primrose Avenue
Yonkers, New York 10710
Telephone unpublished

Adversary: Stanley Yaker, Esq.
Attorney for Paolo Vincelli and Mario Vincelli
114 East 32nd Street
Suite 1104
New York, New York 10016
(212) 983-7241

No attorneys appeared for remaining defendants, who settled pro se.

Date of Hearing: 1/6/88

Case Description: Motion for summary judgment in Lanham Act trademark infringement granted. Damages and attorneys' fees were assessed after an inquest before the magistrate judge. Judgment entered after hearing. (Decision on motion reported at 642 F. Supp. 1143 (S.D.N.Y. 1986)).

A7.

Case Name: Republic of the Philippines v. New York Land Co., et al. (the "Philippines Case") and Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al. (the "Security Pacific Case").

Case Nos.: 90-7322 and 90-7398

Court: United States Court of Appeals for the Second Circuit

Panel: Hon. Thomas J. Meskill
U.S. Circuit Judge
114 W. Main Street, Suite 204
New Britain, Connecticut 06051
(203) 224-2617

Hon. Lawrence J. Pierce
U.S. Circuit Judge
c/o U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 791-0951

Hon. George C. Pratt
U.S. Circuit Judge
U.S. Courthouse
Uniondale Avenue
Hempstead Turnpike
Uniondale, New York 11553
(516) 485-6510

Co-Counsel: Roy L. Reardon, Esq. (455-2840)
David E. Massengill, Esq. (455-3555)
Simpson Thacher & Bartlett
425 Lexington Avenue
New York, New York 10017
(212) 455-2000

Adversaries: Jeffrey J. Greenbaum, Esq.
James M. Hirschhorn, Esq.
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
Attorneys for the Republic of the Philippines
Legal Center
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Date of Argument: 6/15/90 (Argued by Roy L. Reardon, Esq. of Simpson, Thacher & Bartlett)

Case Description: Appeal of District Court's Denial of Motion to Modify Preliminary Injunction by Bulgari Corporation of America. (I had extensive participation in the drafting of appellant's brief and reply and I primarily drafted all motion papers and argued below). The appeal was denied at 909 F.2d 1473 (2d Cir. 1990).

AND

District Court Case Name: Republic of the Philippines v. New York Land Co., et al. (the "Philippines Case") and Security Pacific Mortgage and Real Estate Service Inc. v. Canadian Land Company, et al. (the "Security Pacific Case").

Case Nos.: The Philippines Case: 86 Civ. 2294

The Security Pacific Case: 87 Civ. 3629

Court: United States District Court, Southern District of New York

Judge: Hon. Pierre N. Leval
U.S. Circuit Judge (Then District Court Judge)
U.S. Circuit Judge
U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 857-2319

Co-Counsel: David A. Botwinik, Esq.
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

Participating Adversaries Opposing Motion: Jeffrey J. Greenbaum, Esq.
James M. Hirschhorn, Esq.
Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross
Attorneys for the Republic of the Philippines
Legal Center
1 Riverfront Plaza
Newark, New Jersey 07102
(201) 643-7000

Michael Stanton, Esq.
Weil, Gotshal & Manges
Attorneys for Security Pacific
767 Fifth Avenue
New York, New York 10153
(212) 310-8000

Date of Argument: 2/12/90

Case Description: Order to Show Cause for Approval of Sublease by Bulgari Corporation of America.

A8.

Case Name: Miserocchi & C., S.p.A. v. Alfred C. Toepfer International, G.m.b.H.

Case No.: 85-7734

Court: United States Court of Appeals for the Second Circuit

Panel: Hon. J. Edward Lumbard
Senior Judge
U.S. Circuit Judge
U.S. Courthouse
Foley Square
New York, New York 10007
(212) 857-2300

Hon. James L. Oakes
Then-Chief Judge
U.S. Circuit Judge
U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 857-2400

Hon. George C. Pratt
U.S. Circuit Judge
U.S. Courthouse
Uniondale Avenue
Hempstead Turnpike
Uniondale, New York 11553
(516) 485-6510

Adversary: Stephen P. Sheehan
Wistow & Barylick
56 Pine Street
Providence, Rhode Island 02903
(401) 831-2700

Date of Argument: 9/17/84

Case Description: Represented claimant Alfred C. Toepfer International, G.m.b.H. in arbitration and in opposing motion to stay arbitration. Motion to stay was

denied and cross motion to compel arbitration granted. Case involved issue of whether an alter ego of an entity who signed an arbitration agreement could be compelled to arbitrate. The motion was argued by David A. Botwinik of my office, but I prepared the motion papers.

A Notice of Appeal of the Order of the District Court and a Motion for Stay of Arbitration Pending Appeal was brought before the Second Circuit. I argued the motion to stay, which motion was denied and the appeal dismissed during the argument of the motion.

The arbitration resulted in an award in favor of claimant against party who signed agreement and alter ego.

AND

District Court Case Name: Miserocchi & C., Sp.A. v. Alfred C. Toepfer International, G.m.b.H.

Case No .: 84 Civ. 6112

Court: United States District Court, Southern District of New York

Judge: Hon. Kevin Thomas Duffy
U.S. District Judge
U.S. Courthouse
40 Foley Square
New York, New York 10007
(212) 805-6125

Co-Counsel: David A. Botwinik, Esq.
Pavia & Harcourt
600 Madison Avenue
New York, New York 10022
(212) 980-3500

Adversary: Stephen P. Sheehan
Wistow & Barylick
56 Pine Street
Providence, Rhode Island 02903
(401) 831-2700

Date of Argument: 9/5/84 (argued by David Botwinik of Pavia & Harcourt)

A9.

Case Name: The People of the State of New York v. Clemente D'Alessio and Scott Hyman

Indictment No.: 4581/82

Judge: Hon. Thomas B. Galligan (retired)
Acting Justice, Supreme Court, 1st Jud. District
111 Centre Street
New York, New York 10013
(212) 374-8005

Associate Counsel: Karen Greve Milton
Director of Education Training Program
Association of the Bar of the City of New York
42 West 44th Street
New York, New York 10036-6690
(212) 382-6619

Adversaries: Steven Kimelman, P.C.
Attorney for Scott Hyman
110 East 59th Street, 33rd Floor
New York, New York 10022
(212) 682-4200

James Bernard, Esq.
Attorney for Clemente D'Alessio
150 Broadway
New York, New York 10038
(212) 233-0260

Dates of Trial: 2/2/83 to 3/2/83

Case Description: The first child pornography case in New York State after the U.S. Supreme Court upheld the constitutionality of New York's laws. Defendants convicted after trial and sentenced, respectively, to 3 ½ to 7 years and 2 to 6 years.

A10.

Case Name: The People of the State of New York v. Richard Maddicks

Indictment No.: 886/82

Court: Supreme Court of the State of New York, County of New York

Judge: Hon. James B. Leff (retired)
Justice, Supreme Court
100 Centre Street
New York, New York 10013
(212) 374-4966

Lead Counsel: Hugh H. Mo, Esq.
Law Offices of Hugh H. Mo
750 Lexington Avenue
15th Floor
New York, New York 10022
(212) 750-8000

Adversary: Peter A. Furst, Esq.
2316 Funston Place
Oakland, California 94602
(415) 531-3904

Dates of Trial: Almost all of January 1983

Case Description: Consolidated trial of multiple murders, attempted murders, burglaries, robberies and related crimes. Defendant was convicted after trial and sentenced, consecutively, to 67 ½ years-to life. I was co-counsel on the case and prepared and argued before Justice Harold Rothwax, the applicability of New York State's consolidation criteria to crimes of violence which were spread over a year's period of time and which had different modus operandi for each burglary.

Additional Question under Item 18: In addition, if the majority of cases you list in response to this question are older than five years, provide the name, address and phone number for 10-12 members of the legal community who have had recent contact with you, even if the contact was only an appearance before you as a judge.

I have interpreted this question to be seeking a list of individuals who are familiar with either my judicial work because they have appeared before me or with my work in other legal activities such as a speaker or conference panelist. If you seek only individuals who have tried cases or made other substantive appearances before me, please advise me.

1. Hon. Miriam G. Cedarbaum
United States District Court Judge
Southern District of New York
500 Pearl Street, Room 1330
New York, New York 10007
(212) 805-0198

2. Hon. John G. Koeltl
United States District Court Judge
Southern District of New York
500 Pearl Street, Room 1030
New York, New York 10007
(212) 805-0222

3. John S. Siffert, Esq.
Lankler, Siffert & Wohl
500 Fifth Avenue, 33rd Floor
New York, New York 10110
(212) 921-8399

4. Justin N. Feldman, Esq.
Kromish, Lieb, Weiner & Hellman
1114 Avenue of the Americas, 47th Floor
New York, New York 10036-7798
(212) 479-6210

5. Dean John D. Feerick
Fordham Law School
140 West 62nd Street
New York, New York 10023
(212) 636-6875

6. Gerard Walperin, Esq.
Rosenman & Colin
575 Madison Avenue
New York, New York 10022
(212) 940-7100

7. Mary Jo White, Esq.
United States Attorney for the Southern District of New York
or
Jane Booth, Esq.
Chief, Civil Division, U.S. Attorney's Office for Southern District of New York
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Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights

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Notes

Statehood and the Equal Footing Doctrine: The Case for Puerto Rican Seabed Rights

In the near future, negotiations between Puerto Rico and the United States will probably explore statehood as an alternative to the island's current "commonwealth" status.[1] The island's dearth of land-

1. Commonwealth status means the island enjoys self-government in local affairs under its own constitution and association with the United States under the Puerto Rican Federal Relations Act of 1950, §§ 1, 4, 48 U.S.C. §§ 731(b), 731(e) (1970). For a discussion of the continuing debate concerning the nature of commonwealth status, see Cabranes, *Puerto Rico: Out of the Colonial Closet*, FOREIGN POL'Y, Winter 1978, at 66.

The island's ongoing economic difficulties have exacerbated dissatisfaction with the commonwealth arrangement and the island's political parties are voicing demands for a status change. *See, e.g.*, Garcia Passalacqua, *20 Years of Anticolonialism*, San Juan Star, Apr. 23, 1977, at 27, col. 2 (attacks on commonwealth status have brought "[c]olonialism in Puerto Rico" to "its deathbed"); *Puerto Rican Factions Hit Island Status*, Wash. Post, Aug. 19, 1977, at A1, col. 6 ("For the first time, virtually the whole spectrum of political opinion in Puerto Rico appeared before a U.N. committee . . . and criticized the island's commonwealth status.")

Statehood is currently the foremost alternative to the "fast collapsing" commonwealth. Garcia Passalacqua, *Hispanic State or La Republica—IV*, San Juan Star, Mar. 3, 1977, at 27, col. 2. The island's statehood parties since 1952 have received increasingly larger percentages of the vote, culminating in the 48.9% that they received in 1976. *See* Letter from Michael E. Veve, Director, Legal Counsel Section of the Office of the Commonwealth of Puerto Rico to José A. Cabranes, Lecturer in Law, Yale Law School (Mar. 28, 1978) (on file with *Yale Law Journal*). Although this percentage partly reflected protests against the island's economic state under the commonwealth party, the trend toward statehood is clear. *Puerto Rico: the oil issue*, 11 LATIN AMERICA POLITICAL REP., Feb. 4, 1977, at 38.

President Ford's New Year's Eve statehood proposal suggests some United States support for the statehood alternative. *See President Proposes Puerto Rican State; Urges U.S. Initiative*, N.Y. Times, Jan. 1, 1977, at 1, col. 6. President-elect Carter indicated his willingness to support statehood "'if the people who live there prefer that.'" *Carter Weighing Personnel to Fill Sub-Cabinet Jobs*, N.Y. Times, Jan. 2, 1977, at 1, col. 5 & 44, col. 5. A Gallup poll conducted in December 1976 found three out of every five Americans in favor of statehood for Puerto Rico. *59% on Mainland Favor State in Gallup Inc. Poll*, San Juan Star, Jan. 5, 1977, at 1, col. 1.

A bid for statehood by Puerto Rico has increasingly been viewed as inevitable. *See, e.g.*, *Puerto Rico Turnabout*, Wash. Post, Aug. 20, 1977, at A14, col. 1 (editorial) (although mainland has focused little attention on issue of statehood for Puerto Rico, "question is coming"); Ramos, *Has P.R. Passed The Point Of No Return?* San Juan Star, Jan. 15, 1977, at 19, col. 2 ("island's economic absorption by the U.S. will inevitably result in its complete political absorption through statehood"). *But see* Nordheimer, *Puerto Rico Is Torn by Dispute Over Seeking Statehood Status*, N.Y. Times, Apr. 30, 1978, at 1, col. 4 (statehood will not receive more than simple majority in plebiscite and Congress likely to reject statehood petition).

based resources and its ongoing economic stagnation and poverty,[2] coupled with the possibility of offshore oil and mineral wealth,[3] will create political pressures for Puerto Rico to demand exclusive rights to exploit its surrounding seabed[4] in an area ranging from nine to 200

2. *See, e.g.*, Hoyt, *The Mineral Industry of Puerto Rico*, 2 MIN. Y.B. 623, 624 (1974) (island's mineral production includes only cement, clay, lime, salt, sand and gravel, and stone); Lens, *Puerto Rico could become the United States' next Vietnam*, Dallas Times Herald, Aug. 14, 1977, at 1-1, col. 1 & 1-8, col. 1 (discovery of copper and nickel deposits may allay but will not cure island's economic problems).

Since the increase in oil prices in 1972, the island has been beset by serious economic difficulties. *See, e.g.*, Nordheimer, *supra* note 1, at 56, col. 1 (Puerto Rico has become "'welfare state', with 63 percent of the population qualifying for Federal food stamps"); *60% of Puerto Ricans' Income Below Poverty Level*, N.Y. Times, Jan. 1, 1977, at 5, col. 2 ("[u]nemployment [over 30%], inflation and high taxes . . . have seriously crippled Puerto Rico's economy").

3. Studies have shown the possibility of oil and gas deposits from two to nine miles off the northern coasts of the island. The deposits could yield an estimated 200,000 barrels of oil per day, an amount sufficient to supply the island's current daily consumption of 140,000 barrels. Letter from Michael E. Veve, Director, Legal Counsel Section of the Office of the Commonwealth of Puerto Rico (Mar. 31, 1977) (on file with *Yale Law Journal*). Other reports have indicated strong possibilities of limestone or dolomite off the northern coasts. Western Geophysical Company, Evaluation of Hydrocarbon Prospects of the Island of Puerto Rico, Final Report 12 (Feb. 1975) (report to Puerto Rico Water Resources Authority) (on file with *Yale Law Journal*). Mobil Oil Corporation has offered to explore for oil in three northern coast locations. Licha, *Exploración en Tres Puntos*, El Nuevo Dia, Feb. 5, 1977, at 2, col. 1. The discovery of manganese nodules, potato-shaped pellets each containing a wealth of cobalt, nickel, copper, and manganese, have reportedly been made within 200 miles of Puerto Rico's southern coast. Passalacqua Christian, *Romero's miraculous fish oil–II*, San Juan Star, Mar. 19, 1977, at 24, col. 1.

4. Puerto Rico might also seek rights to conserve and manage fishing in a 200-mile economic zone, *see* note 116 *infra* (defining economic zone), off its coasts. The United States has recently declared such a zone. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 101, 90 Stat. 336 (codified at 16 U.S.C. § 1811 (1976)); *cf.* Informal Composite Negotiating Text of the Third United Nations Conference on the Law of the Sea, arts. 56, 57, U.N. Doc. A/CONF. 62/W.P.10 (July 15, 1977) (recognizing 200-mile exclusive economic zone over living and nonliving natural resources) [hereinafter cited as Composite Text]. Although Puerto Rico's demands for rights over the seabed and over fishing management might involve a similar 200-mile limit, the two demands would involve different rights, responsibilities, and duties. *Compare* Convention on the Continental Shelf of the United Nations Conference on the Law of the Sea, art. 2, U.N. Doc. A/CONF. 13/L.55 (Apr. 29, 1958) (declaring rights to exploit continental shelf exclusive to coastal state) [hereinafter cited as Continental Shelf Convention] *with* Convention on Fishing and Conservation of the Living Resources of the High Seas of the United Nations Conference on the Law of the Sea, art. 7, U.N. Doc. A/CONF. 13/L.54 (Apr. 28, 1958) (recognizing coastal state's right to impose regulations to conserve fish but prohibiting discrimination against foreign fishermen) [hereinafter cited as Fishing Convention].

Puerto Rico would likely seek the exclusive right to explore and exploit the natural resources of the seabed. *See* p. 845 *infra*. The federal government currently authorizes the Secretary of the Interior "to grant to the highest responsible qualified bidder" leases for the exploration and development of the submerged lands under national control. *See* Outer Continental Shelf Lands Act of 1953, § 205(a), 43 U.S.C.A. § 1337(a) (West Supp. 1978). A payment of royalty is required. *Id.* § 1337(b). Similarly, Texas authorizes a School Land Board to lease to the highest bidder the exploration and exploitation rights to its submerged lands. *See* TEX. NAT. RES. CODE ANN. tit. 11, §§ 52.011, .019 (Vernon 1977). Louisiana, on the other hand, authorizes its State Mineral Board to issue leases to the bidder making the "bid most advantageous to the state." *See* LA. REV. STAT. ANN. § 30:127(a) (West Supp. 1978). In the Mining Law of 1975, P.R. LAWS ANN. tit. 28, § 117(A) (Supp. 1977), the Secretary of Natural Resources of Puerto Rico is directed to obtain from leases of submerged lands "the highest financial return possible, consistent, however, with the widest possible exploitation or extraction of the commercial mineral." This history of exploitation of submerged lands indicates that the island would follow a leasing program if it were to secure the right to explore its seabed as a state.

5. There is presently considerable disagreement about whether Puerto Rico or the United States has the right to exploit the island's seabed resources. *See Puerto Rico: the oil issue*, *supra* note 1, at 37 (United States and Puerto Rico "waging a quiet but persistent struggle . . . over the island's title to offshore mineral rights"); Agrait, Puerto Rico y la Tercera Conferencia de las Naciones Unidas Sobre el Derecho Del Mar (unpublished paper) (on file with *Yale Law Journal*) (history of island's efforts to secure rights over seabed at Third United Nations Conference on the Law of the Sea). In its Mining Law of 1975, P.R. LAWS ANN. tit. 28, § 111 (Supp. 1977), the island claimed ownership of all exploitable commercial minerals in its continental shelf, which at present extend about 12 miles into the sea. Passalacqua Christian, *Romero's miraculous fish oil*, San Juan Star, Mar. 9, 1977, at 16, col. 1. The United States failed to recognize this claim and Puerto Rico submitted a bill to Congress, H.R. 7827, 95th Cong., 1st Sess. (1977), still in committee, seeking jurisdiction, like that exercised by Texas and Florida, over three marine leagues (nine nautical miles). Passalacqua Christian, *Island 'adrift in a leaky canoe'*, San Juan Star, Mar. 6, 1978, at 15, col. 2.

Commonwealth supporters have been lobbying for Puerto Rico to claim control over the 200-mile economic zone recognized in the Composite Text, *supra* note 4, arts. 56, 57. *See*, Bryan, *Copaken Cree la Isla Está Perdiendo Oportunidad Para Que se Establezca Límite Sobre sus Aguas Territoriales*, El Mundo, Feb. 21, 1977, at 11-B, col. 5; *RHC calls for pressure on U.S. to obtain rights to offshore oil*, San Juan Star, July 1, 1977, at 3, col. 1.

The United States has declared its rights over the continental shelf to the limits of its exploitability. Outer Continental Shelf Lands Act of 1953, § 202, 43 U.S.C.A. § 1332 (West Supp. 1978). In the Third Law of the Sea Conference, the United States proposed the recognition of a 200-mile economic zone, *see* note 116 *infra* (defining economic zone), in which coastal nations could exclusively exploit the natural resources of the seabed. Documents of the Second Committee, United States Draft Articles, 3(2) Third U.N. Conference on the Law of the Sea (Caracas, Venez.) 222, arts. 1, 2, U.N. SALES No. E.75. V.5 (Aug. 8, 1974). Thus by the time the question of statehood for Puerto Rico is faced by Congress, the United States may well recognize a 200-mile shelf zone. Therefore Puerto Rico could at a minimum ask for control to the limit of exploitability, 12 miles, and at the maximum request the 200 miles being recognized by the international community. *See* Composite Text, *supra* note 4, art. 57.

6. It is unlikely that opposing political parties of the island would allow statehood negotiators to concede to the federal government Puerto Rican resources as valuable as those of the seabed. *See, e.g.*, Passalacqua Christian, *supra* note 3 (seabed resources have potential of "reducing and ending . . . dependence on Federal Aid Programs . . . [and it] would not look good for [Governor] to be accused of giving away to the Federal Government Puerto Rico's natural resources and thus binding us over in the bondage of Federal dole forever"); *RHC Calls for Pressure on U.S. to Obtain Rights to Offshore Oil*, *supra* note 5 (former Governor calls on statehood government to demand 200-mile zone).

Seabed resources would aid Puerto Rico in solving the economic difficulties exacerbated by its mineral deficiencies, especially in oil, *see* note 2 *supra*, and may be necessary to compensate for the increased economic burdens imposed by statehood. *See* UNITED STATES–PUERTO RICO COMMISSION ON THE STATUS OF PUERTO RICO, HEARINGS ON THE STATUS OF PUERTO RICO, S. Doc. No. 108, 89th Cong., 2d Sess. 593-602 (1966) (Dr. Alvin Mayne) (statehood would require greater contribution to federal purse, and labor costs would increase prohibitively if federal minimum wage laws applied to island). *But see id.* at 623-35 (Arthur Burns) (statehood for Puerto Rico is economically feasible).

miles into the sea.[5] The inclusion of such a provision in Puerto Rico's compact of admission could be politically necessary and practically essential.[6]

Nevertheless, because such an agreement would grant the island

seabed rights denied to any of the fifty states at their admission to the Union,[7] it would probably meet with opposition based on the "equal footing doctrine."[8] That doctrine "prevents extension of the sovereignty of a State into a domain of political and sovereign power of the United States from which the other States have been excluded" when the state enters the Union.[9] Although the Supreme Court in *Alabama v. Texas*[10] held that Congress has the power under the property clause of the Constitution to grant existing states unequal seabed rights,[11]

7. *See* pp. 832-33 *infra* (discussing United States v. Texas, 339 U.S. 707 (1950), which vested seabed rights in federal government at state's admission because of equal footing doctrine).

8. *See* note 9 *infra*.

Another objection involves a possibility that the Puerto Rican government might seek to favor its citizens in granting rights to exploit the seabed. *See* Mining Law of 1975, P.R. LAWS ANN. tit. 28, § 117(14) (Supp. 1977) (requiring every person who leases right to extract commercial minerals to agree that "insofar as economically possible, persons residing in Puerto Rico be employed for the works originating and carried out under such lease, and that such persons be trained in such operations as require technical skills"). Puerto Rico as a state, however, would be subject to challenges of such actions based on the privileges-and-immunities and equal protection clauses. U.S. CONST. amend. XIV, § 1; *see, e.g.*, Toomer v. Witsell, 334 U.S. 385, 395-403 (1948) (South Carolina licensing scheme discriminating against nonresident fishermen declared invalid under privileges-and-immunities clause); Alexandria Scrap Corp. v. Hughes, 391 F. Supp. 46, 56-58 (D. Md. 1975) (Maryland statute requiring processors to have office in state contrary to equal protection clause). It is beyond the scope of this Note to discuss the propriety of such favoritism by a state toward its own citizens.

9. United States v. Texas, 339 U.S. 707, 719-20 (1950) (plurality opinion). The equal footing requirement first appeared in the Northwest Ordinance of 1787, *see* 1 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION 168 (M. Jensen ed. 1976) (quoting Ordinance in full), as a condition demanded by Virginia for its cession of western lands to the Union, *see* Hanna, *Equal Footing in the Admission of States*, 3 BAYLOR L. REV. 519, 523 (1951) (history of equal footing clause). Beginning with the admission of Tennessee in 1796, all states were admitted using the equal footing clause. *Id.*

Congressional concern and belief in the necessity for "equality" of states was quite evident when Hawaii attempted, during its statehood negotiations, to secure control over the seabed between its islands and was rebuffed by equal footing arguments. *See Statehood for Hawaii: Hearings on S. 49, S. 51 & H.R. 3575 Before the Senate Comm. on Interior and Insular Affairs*, 83d Cong., 1st & 2d Sess. pt. 2, at 40-53 (1954) (history of Hawaii's demands and their resolution). Hawaii finally agreed to accept a condition in its act of admission that the Submerged Lands Act of 1953 "shall be applicable to the State of Hawaii, and the said State shall have the same rights as do existing states thereunder." *Id.* pt. 3, at 725.

It seems probable that similar equal footing arguments will arise during Puerto Rico's negotiations over statehood because it is so often assumed that entering the Union would automatically require relinquishment to the federal government by the island of its rights to seabed resources. *See, e.g.*, O'Toole, *Offshore Oil Issue Raised in P.R. Proposal*, Wash. Post, Jan. 2, 1977, at A2, col. 3 (President Ford's statehood proposal may have been motivated by desire to federalize island's offshore resources); Pasalacqua Christian, *supra* note 3 (island's rights over seabed would disappear if it became state; under statehood it would be entitled to only three miles under United States laws). Finally, precedent indicates that opposition by existing states or the executive might arise if the island were granted disproportionate rights. *See* notes 101 & 102 *infra*.

10. 347 U.S. 272 (1954) (per curiam).

11. *Id.* at 273; *see* U.S. CONST. art. IV, § 3, cl. 2 ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . .")

the Court has not directly addressed the question whether the equal footing doctrine permits Congress to grant rights to an incoming state that exceed those granted to any existing state at its admission.[12]

This Note suggests a new historical analysis of the equal footing doctrine that demonstrates that the doctrine poses no barrier to such an extensive seabed grant upon Puerto Rico's admission into the Union. The Note defines the submerged lands issues left unsettled by the case law, and derives a framework for the equal footing doctrine from a historical analysis of submerged lands and equal footing cases. It then applies this framework to Puerto Rico's claims and demonstrates that Congress may, without violating the equal footing doctrine, cede seabed rights to the island on admission.[13] Finally, the Note suggests considerations for the language of such an agreement and defines its limitations.

I. The Allocation of Seabed Rights

In a long line of cases,[14] the Supreme Court has invoked the equal footing doctrine to vest control over the seabed in the federal government.[15] Although their reasoning and results have been subjected to numerous criticisms,[16] the cases retain their precedential value.[17] The

12. *See* pp. 832-33, 838 *infra*.

A mere expectancy or even a promise of seabed control after admission would not be a sufficient guarantee for Puerto Rico as it commits itself to the irrevocable status of statehood. Seabed rights are inextricably tied to the other economic and political issues surrounding Puerto Rican statehood. *See* note 6 *supra*. The grant of seabed rights must be simultaneous with admission. *See* Pasalacqua Christian, *supra* note 3 (admission to Union without full seabed rights would be "cruel jest" on Puerto Rican people).

13. The present Governor of Puerto Rico, Carlos Romero Barcelo, has declared that if his party is returned to power in 1980, he will pursue a plebiscite for statehood the next year. NEWSWEEK, Sept. 11, 1978, at 35. In order to make an objective and informed decision concerning their future, the Puerto Rican people need to understand the difference between the constitutional and the political prices that statehood would require. The equal footing framework developed in this Note can be applied to test the constitutional basis of any condition for admission demanded by Congress or by Puerto Rico.

14. *See, e.g.*, United States v. Texas, 339 U.S. 707 (1950); United States v. Louisiana, 339 U.S. 699 (1950); United States v. California, 332 U.S. 19 (1947).

15. *See* pp. 831-33 *infra*.

16. *See, e.g.*, Hanna, *The Submerged Land Cases*, 3 BAYLOR L. REV. 201, 204 (1951) ("few judicial decisions . . . contrary to the expressed views of more well-informed lawyers"); Naujoks, *Title to Lands Under Navigable Waters*, 32 MARQ. L. REV. 7, 37 (1948) ("United States Supreme Court is wrong . . . in holding that the Federal Government has paramount rights to the tidelands"). *But see* Clark, *National Sovereignty and Dominion Over Lands Underlying the Ocean*, 27 TEX. L. REV. 140, 141 (1948) ("historical, political and practical" reasons exist for federal dominion over seabed).

17. *See* United States v. Maine, 420 U.S. 515, 519, 524 (1975) (reaffirming reasoning and results of cases vesting rights over seabed in federal government). A Special Master appointed by the Court to take and review evidence in *Maine* found that the historical conclusions of the submerged lands cases were correct. Report of Albert B. Maris, Special Master, at 75-81, United States v. Maine, 420 U.S. 515 (1975) [hereinafter cited as Special Master's Report]. The Court in *Maine* accepted the Master's findings. 420 U.S. at 522-25.

cases merit careful analysis, because the Court has never explicitly decided whether the equal footing doctrine is a constitutional limitation on the power of Congress to set the terms for admission into the Union and, if so, whether this limitation precludes Congress from granting disproportionate seabed rights to an incoming state.

Until the 1940s, the leading authority concerning states' rights to control over the seabed was the 1845 case of *Pollard's Lessee v. Hagan*.[18] *Pollard* held that because Alabama had been admitted to the Union on an "equal footing" with the other states, it was entitled to the same rights of sovereignty and jurisdiction over shorelands as were possessed by the original states.[19] For over a century *Pollard* stood for the broad proposition that states owned title to all "navigable waters, and the soils under them"[20] within their historic boundaries.[21] A series of Supreme Court decisions from 1947 to 1950, the *Tidelands Cases*,[22]

18. 44 U.S. (3 How.) 212 (1845). In *Pollard*, the Court rejected plaintiff's claim to certain shorelands based on a federal patent issued after Alabama's admission into the Union. Plaintiff had argued that the United States in Alabama's compact of admission retained ownership of the lands. *Id.* at 220-21.

19. *Id.* at 228-29. The Court held that, at the time of the American Revolution, " 'the people of each state became themselves sovereign,' " and possessed the absolute right to all navigable waters and soils within the colony. *Id.* at 229 (quoting Martin v. Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)). The independent colonies retained this sovereign right at the formation of the Union. *Id.*

The Court in *Pollard* also invoked the premise that the federal government could not permanently hold or condemn lands within the boundaries of a state without the state's express consent. *Id.* at 223. The Constitution reserved title to "shores of navigable waters, and the soils under them" to the original states. *Id.* at 230. Alabama was admitted on an equal footing, because the Court imputed to the state at the time of its admission ownership of and sovereignty over all lands that it did not explicitly cede to the federal government in its compact of admission. *Id.* at 223. The Court found that a provision reserving for the United States waste and unappropriated lands (public lands) did not include shorelands, and that a condition concerning freedom of navigable waters was only a "regulation of commerce" and did not confer property rights on the United States. *Id.* at 230. Therefore, the federal patent to plaintiff was invalid. *Id.*

It was not until 1875, in Kohl v. United States, 91 U.S. 367 (1875), that the Supreme Court held that the power of eminent domain was inherent in sovereignty and that, consequently, in order to implement its constitutional functions, the United States could condemn lands within a state without the state's consent. *Id.* at 373-74. In United States v. Texas, 339 U.S. 707 (1950), the Court plurality further held that an express state grant at admission was not necessary in order for a state to relinquish title to the United States. *Id.* at 718.

20. 44 U.S. (3 How.) at 230.

21. *Pollard* actually held that states owned title to all "*shores* of navigable waters, and the soils under them." *Id.* (emphasis added). Nevertheless, subsequent cases interpreted *Pollard* to mean that a state owned title to all tide waters and their beds within the state's territorial boundaries. *See, e.g.*, The Abby Dodge, 223 U.S. 166, 175 (1912); McCready v. Virginia, 94 U.S. 391, 394-95 (1876). For a general history of cases relying on the *Pollard* rule, see Naujoks, *supra* note 16, at 21-37.

22. "Tidelands" is a misnomer given to three submerged lands cases—United States v. Texas, 339 U.S. 707 (1950), United States v. Louisiana, 339 U.S. 699 (1950), and United States v. California, 332 U.S. 19 (1947). *See* Hyder, *United States v. California*, 19 Miss. L.J. 265, 265 & nn.2-3 (1948) (*Tidelands Cases* involved lands under tide waters and not tidelands, lands covered and uncovered by ordinary tide).

overturned this broad reading of *Pollard*, but failed to provide a consistent or clear framework for evaluating subsequent equal footing claims.

In the first *Tidelands Case, United States v. California*,[23] the Court upheld the federal government's claim to all submerged land rights in the three-mile marginal sea[24] claimed by California.[25] Because the original states had never acquired imperium (regulatory power) or dominium (ownership interest)[26] over the submerged lands of the marginal sea, and because California was admitted to the Union on an equal footing with the original states, the Court held that California had demonstrated no ownership of the claimed area.[27] *Pollard* was distinguished by the fact that acquisition, protection, and control of the three-mile marginal belt "has been and is a function of national external sovereignty."[28] Thus, lands in which "national interests" such as defense, commerce, and foreign affairs were dominant were deemed

23. 332 U.S. 19 (1947).

24. "Marginal sea" and "territorial sea" refer to the three-mile belt of water measured from the seaward edge of inland waters. *See* United States v. Louisiana, 394 U.S. 11, 22 (1969) (defining terms); Manchester v. Massachusetts, 139 U.S. 240, 258 (1891) (recognizing one league as minimum limit).

25. 332 U.S. at 34-36, 39-40. California argued that because the original states acquired title to the three-mile belt from the English Crown and because it had been admitted on an equal footing with the original states, it acceded to the same right of title over the submerged lands. *Id.* at 23. California also pleaded several defenses all of which the Court dismissed summarily. *Id.* at 23-24 & n.2, 39-40.

26. The *California* majority held that national interests required that the federal government have the "powers of dominion and regulation" over the marginal belt. *Id.* at 35. Justice Frankfurter, in dissent, used the terms "dominium" and "imperium," *id.* at 43-44, to refer to what the majority labelled "dominion" and "regulation." He argued that although the majority was right in denying California a proprietary interest or dominium over submerged lands and in asserting that national interests conferred regulatory power on the federal government, the majority failed to explain how the federal government acquired dominium. *Id.* at 44. Justice Frankfurter's "imperium" and "dominium" terminology was later adopted by the plurality in United States v. Texas, 339 U.S. 707, 712-13 (1950).

27. 332 U.S. at 32, 38-39. Without an evidentiary hearing, the Court said that it could not conclude that "the thirteen original colonies separately acquired ownership of the three-mile belt or the soil under it, even if they did acquire elements of the sovereignty of the English Crown by their revolution against it." *Id.* at 31 (footnote omitted). In United States v. Maine, 420 U.S. 515 (1975), a Special Master finally conducted a hearing on historical evidence, *see* Special Master's Report, *supra* note 17, at 25-65, and the Court explicitly found that the colonies had not owned the three-mile belt. 420 U.S. at 522. *But see* Hardwicke, Illig & Patterson, *The Constitution and the Continental Shelf*, 26 Tex. L. Rev. 398, 408-26 (1948) (colonies and original states were landowners of submerged lands).

28. 332 U.S. at 34. The Court limited the *Pollard* rule to cover only state ownership of inland waters and soils under them (land between the lines of the ordinary high and low water marks). *Id.* at 36. The *Pollard* rule had been applied in other cases involving the marginal sea. *See* note 21 *supra* (citing cases). The *California* Court read those cases as involving only the right of states to regulate fishing in the absence of conflicting congressional legislation. 332 U.S. at 37-38.

to be within the "paramount rights" and powers of the federal government after the admission of a state into the Union.[29]

Three years later, the Court followed *California "a fortiori"* in *United States v. Louisiana*,[30] and expanded its reasoning in *United States v. Texas*.[31] Texas, as an independent republic, had claimed and exercised both imperium and dominium over submerged lands three marine leagues (nine nautical miles) from its shore.[32] Texas argued that at its admission it ceded to the United States only imperium, and not dominium, to this area.[33] Justice Douglas, writing for the Court plurality, disagreed, holding that "although *dominium* and *imperium* are normally separable and separate,"[34] "national interests and national responsibilities" compelled federal control of both regulatory and property interests in the seabed.[35] Because it entered the Union on an equal footing with the original states,[36] Texas automatically lost all

29. 332 U.S. at 34-36, 38-39.

30. 339 U.S. 699, 705 (1950). Based on a 1938 state statute, Louisiana claimed control over the seabed within 27 miles of its shores. *Id.* at 703. The United States sought a declaration of its rights to the area. *Id.* at 701. The Court held that the federal government's sovereignty extended to the entire area claimed by Louisiana, even though no federal claim to the seabed beyond three miles had been proven. *Id.* at 704-05. The Truman Proclamation of 1945, Exec. Proclamation No. 2667, 3 C.F.R. 67, 68 (1945), had declared United States "jurisdiction and control" over the continental shelf, but, as was explained in an accompanying release, Exec. Order No. 9633, 3 C.F.R. 437 (1945), the Truman Proclamation did not purport to vest title to the shelf in either the federal or state governments. *But see* Note, *Conflicting State and Federal Claims of Title in Submerged Lands of the Continental Shelf*, 56 YALE L.J. 356, 369 (1947) (Supreme Court could use Truman Proclamation to vest title to shelf in federal government). It was not until three years after *Louisiana* that Congress declared it "to be the policy of the United States that the subsoil and seabed of the [shelf area outside the marginal sea] appertain to the United States." Outer Continental Shelf Lands Act of 1953, Pub. L. No. 83-212, § 3, 67 Stat. 462 (codified at 43 U.S.C.A. § 1332 (West Supp. 1978)). Once again, as in United States v. California, 332 U.S. 19 (1947), the Court in *Louisiana* failed to explain how the federal government acquired dominium over the shelf. *See* note 26 *supra* (discussing *California* Court's failure to explain national acquisition of dominium).

31. 339 U.S. 707 (1950) (plurality opinion). The United States in *Texas* sought a declaration of rights over the submerged lands in the Gulf of Mexico bordering Texas. *Id.* at 709.

32. *Id.* at 712-13. The Court plurality assumed the validity of Texas's claim that it had exercised imperium and dominium over the three marine league belt as a Republic. *Id.* at 717.

33. *Id.* at 712-13. The intention to cede only imperium, Texas argued, was evidenced by the retention of vacant and unappropriated lands in its compact of admission. *Id.* at 714-15; *see* Joint Resolution for annexing Texas to the United States, J. Res. 8, 28th Cong., 2d Sess. 797 (1845). The United States responded by arguing that Texas's grant of all property necessary to the public defense impliedly ceded the marginal belt to the federal government. 339 U.S. at 714-15.

34. 339 U.S. at 719 (footnote omitted).

35. *Id.*

36. Justice Douglas found the equal footing doctrine to control and bind the substance of admission even without the agreement of the state to the terms of the admission declaration. The Justice relied on the equal footing clause of the Joint Resolution for annexing Texas to the United States, J. Res. 8, 28th Cong., 2d Sess. 797 (1845), to dispose

seabed dominium to the federal government.[37]

In 1953, Congress passed the Submerged Lands Act,[38] which vested ownership of the marginal sea and its resources in the states[39] and provided that states could claim a greater seaward boundary to a limit of three marine leagues in the Gulf of Mexico[40] if "it was so provided by its constitution or laws prior to or at the time such State became a member of the Union, or if it has been heretofore approved by Congress."[41] In a per curiam decision in *Alabama v. Texas*,[42] the Court denied the motions of Alabama and Rhode Island for leave to file complaints challenging the constitutionality of the Submerged Lands Act.[43] Alabama and Rhode Island claimed that by granting some Gulf states an extended boundary over the three miles to the three marine league limit, the Submerged Lands Act violated the equal footing guarantees in their acts of admission and resulted in their "inferior sovereignty."[44]

The Court, which included only three members of the majority that had decided the *Tidelands Cases*, summarily upheld the Submerged Lands Act on the ground that Congress, under the property clause of

of the controversy. 339 U.S. at 719. Texas, however, was not admitted under that "Joint Resolution" but under the Joint Resolution for the Admission of Texas into the Union, J. Res. 1, 29th Cong., 1st Sess. 108 (1845). The latter resolution was never "submitted to nor accepted by Texas." Hanna, *supra* note 9, at 520. The Court plurality later ordered the amendment of the *Texas* opinion to make correct reference to the proper document. United States v. Texas, 340 U.S. 848 (1950).

37. 339 U.S. at 718.

38. Pub. L. No. 83-31, 67 Stat. 29 (1953) (codified at 43 U.S.C. §§ 1301-1315 (1970)). The Act was intended to undo the effects of the *Tidelands* triad. *See* S. REP. No. 133, 83d Cong., 1st Sess. 8, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1474, 1481 ("purpose of [Submerged Lands Act] to write the law . . . as the Supreme Court believed it to be in the past—that the States shall own . . . all lands under navigable waters within their territorial jurisdiction"); H.R. REP. No. 695, 82d Cong., 1st Sess. 5, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1395, 1399 (Submerged Lands Act fixed as law that which prior to *California* "believed and accepted to be the law of the land"—that states own submerged lands within their boundaries). The Supreme Court viewed the Act as an exercise of Congress's power to dispose of public property, and not as a mandate to overturn the *Tidelands Cases*. *See* United States v. Louisiana, 363 U.S. 1, 7 (1960).

39. 43 U.S.C. § 1311(a) (1970).

40. *Id.* § 1301(b) ("in no event shall the term 'boundaries' . . . be interpreted as extending from the coast line more than three geographical miles into the Atlantic Ocean or the Pacific Ocean, or more than three marine leagues into the Gulf of Mexico").

41. *Id.* § 1312.

42. 347 U.S. 272 (1954).

43. *Id.* at 273.

44. Complainant Alabama's Brief in Support of Motion for Leave to File Complaint and Complaint at 57-72, Alabama v. Texas, 347 U.S. 272 (1954) (Alabama grant extends only to three-mile belt; any greater grant to other states denies equal footing and results in making Alabama's sovereignty inferior); Brief for Complainant Rhode Island at 10, Alabama v. Texas, 347 U.S. 272 (1954) (Rhode Island claims Submerged Lands Act violates equal footing clause).

the Constitution, could divest itself of the "public domain."[45] Justice Douglas, the author of *Louisiana* and *Texas*, and Justice Black, the author of *California*, relied on the equal footing doctrine to argue that Congress had no authority to "relinquish elements of national sovereignty over the Oceans."[46] The new Court in *Alabama*, however, overturned *Texas* sub silentio by holding that Congress in a postadmission grant could separate property interests in the seabed from national sovereignty.[47] The Court subsequently confirmed Congress's power to cede federal "property" to states in unequal portions.[48] Recently, in *United States v. Maine*,[49] the Court reaffirmed the results of its *Tidelands Cases* by upholding the paramount rights of the federal government to the continental shelf[50] outside the marginal sea.[51] Thus it remains unclear whether the equal footing doctrine is a constitutional bar to a congressional grant of disproportionate seabed rights to an incoming state. In light of subsequent cases, it cannot be argued that the *Texas* decision settled this question.

45. 347 U.S. at 273.

46. *Id.* at 279 (Black, J., dissenting); *see id.* at 282 (Douglas, J., dissenting). Justice Douglas viewed federal powers over submerged lands as "incidents of national sovereignty" that could not be "abdicated" without undermining the equality of states the equal footing clause required. *Id.* at 282-85.

47. *See* 34 B.U. L. Rev. 504, 507 (1954) (*Alabama* "tacitly repudiated" *Texas*); *cf.* 30 U. Miami L. Rev. 203, 213 (1975) (Submerged Lands Act, granting seabed rights to states, is "de facto repudiation" of prior rationale for vesting control in federal government). *Texas* and *Alabama* indicate that the Court perceived a difference between a grant at admission and a grant after admission. The *Texas* plurality viewed seabed rights as so intertwined with sovereignty as to be inseparable at admission. Otherwise "there is or may be in practical effect a subtraction in favor of Texas from the national sovereignty of the United States." 339 U.S. at 719. A seabed grant after admission, however, "was merely an exercise of" paramount national power. United States v. Maine, 420 U.S. 515, 524 (1975). This reasoning fails to explain the argument in *Texas* that in the case of seabed rights, property rights (dominium) follow and commingle with sovereignty (imperium). 339 U.S. at 719. In effect, the underpinning of *Texas* was overturned because in *Alabama* the Court found property rights separate and separable from national sovereignty. *But cf.* p. 840 *infra* (harmonizing results of *Alabama* and *Texas*).

48. In United States v. Louisiana, 363 U.S. 1 (1960), and United States v. Florida, 363 U.S. 121 (1960), the Court recognized claims under the Submerged Lands Act by Texas and Florida for dominium over three marine leagues in the Gulf of Mexico, but denied similar claims by Louisiana, Mississippi, and Alabama. Texas and Florida showed that it was the intention of Congress to recognize the extended boundaries that existed at the time of Texas's admission to the Union and at the time of Florida's readmission after the Civil War. This showing of congressional intent was the sole element necessary to establish entitlement under the Submerged Lands Act. United States v. Louisiana, 363 U.S. 1, 29-30 (1960).

49. 420 U.S. 515 (1975). The defendants in *Maine* were the 13 states bordering the Atlantic Ocean. *Id.* at 516-17.

50. Continental shelves have typically been defined

> as those slightly submerged portions of the continents that surround all the continental . . . mass that forms the lands above water. They are that part of the continent temporarily (measured in geological time) overlapped by the oceans. The outer boundary of each shelf is marked by a sharp increase in the slope of the sea floor. It is the point where the continental mass drops off steeply toward the ocean deeps.

H.R. Rep. No. 215, 83d Cong., 1st Sess. 6, *reprinted in* [1953] U.S. Code Cong. & Ad. News 1385, 1390.

51. 420 U.S. at 527-28.

II. The Equal Footing Doctrine: A Historical Reinterpretation

One reason the submerged lands cases seem confused or inconsistent is that the Court has never adequately defined the content or sources of the equal footing doctrine. The equal footing doctrine ultimately rests on concepts of federalism: the United States is a "union of political equals."[52] Although superficially derived from a clause common in statehood compacts,[53] equal footing in this century has emerged as an amalgam of constitutional and statutory precepts. Constitutional principles alone act as an affirmative limitation on congressional power to negotiate terms in compacts of admission, but statutory precepts also guide courts as they interpret such compacts.

A. *The Constitutional Component of the Equal Footing Doctrine*

The Constitution provides that "[n]ew States may be admitted by the Congress into this Union."[54] Congress may, on "penalty of denying admission," require any conditions for entry into the Union.[55] Since the admission of Ohio in 1802,[56] Congress has imposed on states a variety of special conditions that have limited the sovereign and political powers that states can exercise after admission.[57] On the other

52. Case v. Toftus, 39 F. 730, 732 (C.C.D. Or. 1889) ("The doctrine that new states must be admitted . . . on an 'equal footing' with the old ones does not rest on any express provision of the constitution . . . but on what is considered . . . to be the general character and purpose of the union of the states . . . —a union of political equals.")

53. *See* p. 836 *infra*.

54. U.S. Const. art. IV, § 3, cl. 1. *See generally* Park, *Admission of States and the Declaration of Independence*, 33 Temp. L.Q. 403, 405 (1960) (five procedural methods by which states have historically been admitted).

55. Coyle v. Smith, 221 U.S. 559, 568 (1911); *cf.* Brittle v. People, 2 Neb. 198, 216 (1872) (how states will be admitted is political question to be settled by territorial residents and Congress—not courts).

56. *See* Enabling Act of Ohio, ch. 40, 2 Stat. 173 (1802). Prior to Ohio's admission, Vermont, Kentucky, and Tennessee, the first three states added to the new union, were admitted without the imposition of conditions. *See* An Act for the admission of Tennessee, ch. 47, 1 Stat. 491 (1796); An Act for the admission of Vermont, ch. 7, 1 Stat. 191 (1791); An Act admitting Kentucky, ch. 4, 1 Stat. 189 (1791). For an explanation of enabling acts and acts of admission, see Park, *supra* note 54, at 405 (enabling act authorizes constitutional convention whereas act of admission ratifies admission of state; act of admission need not be preceded by enabling act).

57. *See* note 60 *infra* (examples of conditions); Dunning, *Are the States Equal Under the Constitution?* 3 Political Sci. Q. 425 (1888) (conditions imposed on incoming states in nineteenth century); Park, *supra* note 54, at 406-10 (conditions imposed in twentieth century).

hand, since the admission of Tennessee in 1796,[58] Congress has included in each state's act of admission a clause providing that the state would enter the Union "on an equal footing with the original States in all respects whatever."[59] To eliminate the tension between "equal footing" clauses and the conditions limiting the sovereign and political powers of particular states after admission,[60] the Supreme Court in the nineteenth and early twentieth centuries held the conditions to be either valid exercises of Congress's commerce or property powers[61] or state constitutional provisions that could later be removed by the amendment process.[62]

Nevertheless, the Supreme Court struck down one such condition in 1911 in *Coyle v. Smith*.[63] The Court in *Coyle* upheld an Oklahoma statute moving the state capital from Guthrie to Oklahoma City against a challenge that the move violated the state's enabling act. Plaintiff, a property owner in Guthrie, claimed that the statute contravened a condition in the act under which the state had agreed not to move its

58. *See* An Act for the admission of Tennessee, ch. 47, 1 Stat. 491 (1796).

59. *See* Hanna, *supra* note 9, at 523-24. Prior to Tennessee's admission, Vermont and Kentucky were each "received and admitted into this Union, as a new and entire member of the United States of America." An Act for the Admission of Vermont, ch. 7, 1 Stat. 191 (1791); An Act Admitting Kentucky, ch. 4, 1 Stat. 189 (1791). This language is close to the equal footing terminology, although the phrase is not used explicitly.

60. In reviewing the conditions imposed on states, one nineteenth century scholar suggested that "the theory that all states have equal powers must be regarded as finally defunct." Dunning, *supra* note 57, at 452. Many of the conditions commonly imposed upon incoming states, such as the duties to keep navigable rivers toll-free for United States citizens and tax nonresident and resident proprietors equally, *see, e.g.*, Enabling Act of Louisiana, ch. 21, § 3, 2 Stat. 641 (1811), were grounded in Congress's constitutional powers. Other less common conditions, such as requirements that state constitutions provide that government officials be literate in English, *see, e.g.*, Enabling Act of New Mexico and Arizona, Pub. L. No. 61-219, § 2, 20, 36 Stat. 557 (1910), or that polygamous marriages be prohibited, *see, e.g.*, Enabling Act of Utah, ch. 138, § 3, 28 Stat. 107 (1894), did not involve matters that were generally viewed at that time as subject to federal regulation. *See* C. Beard, American Government and Politics 459-72 (4th ed. 1926) (states in eighteenth and nineteenth century differed widely in self-imposed electoral requirements); G. Curtis, Admission of Utah: Limitation of State Sovereignty by Compact with the United States 17 (1887) (opinion pamphlet) (Constitution reserved to states power to control domestic relations, including polygamy; Utah's power limited because of terms of compact of admission).

61. U.S. Const. art. I, § 8, cl. 3 (commerce clause); *id.* art. IV, § 3, cl. 2 (property clause); *see, e.g.*, United States v. Sandoval, 231 U.S. 28, 38 (1913) (conditions relating to regulation of affairs with Indian tribes within commerce power clause); Stearns v. Minnesota, 179 U.S. 223, 250 (1900) (provisions relating to federal property within power to dispose of property).

62. Coyle v. Smith, 221 U.S. 559, 568 (1911) (dictum); *accord*, Brittle v. People, 2 Neb. 198, 218 (1872); *see* Monnet, *Violations by a State of the Conditions of its Enabling Act*, 10 Colum. L. Rev. 591, 605 (1910) (Congress cannot "keep a State in tutelage after it comes into the Union"; state can always amend its constitution).

63. 221 U.S. 559 (1911).

capital before 1913.[64] The Court held that under the equal footing doctrine Congress cannot, as a condition of admission, either place limitations on the powers of a new state or demand the right to exercise powers over a new state not authorized by the Constitution.[65] The Court suggested for the first time that the equal footing doctrine derived its force not merely from the inclusion of an equal footing clause in acts of admission, but also from the constitutional imperative of equality among the states.[66] It asserted that the words "this Union" in Article IV of the Constitution[67] refer to "a union of States, equal in power, dignity and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself."[68]

The holding in *Coyle* rested on notions of "dual federalism." Under this doctrine federal and state governments were viewed as fully independent in their respective spheres of power, with federal powers enumerated by Article I and all other powers reserved to the states by the Tenth Amendment.[69] As a result, Congress cannot in an act of admission diminish or impair the sovereign and political powers of an incoming state, including the power to designate its capital.[70]

64. *Id.* at 563-64; *see* Enabling Act of Oklahoma, Pub. L. No. 59-234, § 2, 34 Stat. 267 (1906). The condition was not included in the state's constitution but was adopted in a separate ordinance. 221 U.S. at 564-65.

65. 221 U.S. at 573.

66. *Id.* at 580.

67. U.S. Const. art. IV, § 3, cl. 1 ("New States may be admitted by the Congress into this Union . . . .")

68. 221 U.S. at 567.

69. The term "dual federalism" was coined by Professor Corwin. *See* E. Corwin, The Twilight of the Supreme Court 1 (1934). He used the term to describe the judicial approach to federalism that prevailed from the Taney Court to the New Deal. *Id.* at 50.

Many of the Supreme Court's decisions before the New Deal reflected dual federalist notions. *See, e.g.*, United States v. Butler, 297 U.S. 1, 77-78 (1936) (Agricultural Adjustment Act unconstitutional because taxing power cannot be used for federal regulation in area reserved to states); Hammer v. Dagenhart, 247 U.S. 251, 273-76 (1918), *overruled*, United States v. Darby, 312 U.S. 100, 116 (1941) (Act of 1916 to prevent interstate commerce in products of child labor unconstitutional as federal intrusion into state matters). *See generally* M. Vile, The Structure of American Federalism 68 (1961) (under dual federalism, exercise of federal government's constitutional powers limited by state sovereignty; Tenth Amendment frequently invoked to curtail express congressional power); Corwin, *The Passing of Dual Federalism*, 36 Va. L. Rev. 1, 4 (1950) (federal and state governments are co-ordinate with and equal to one another).

70. 221 U.S. at 573 (sovereign and political powers of incoming states cannot be "constitutionally diminished, impaired or shorn away by any conditions, compacts or stipulations" in acts of admission).

The equal footing doctrine, however, does not require the equality of states in the manner in which they exercise sovereign and political powers. For example, in such matters as powers delegated to the three branches of government or to local governments, the arrangements of the states vary substantially. *Compare* Cal. Const. arts. IV, V (delegating general powers to autonomous executive branch; relying extensively on ref-

Conversely, the equal footing doctrine, based on notions of sovereign equality, might also prohibit the enlargement of the powers of particular states into areas granted by the Constitution to the national government. This inversion of the constitutional equal footing doctrine formed the basis for the Court's 1950 plurality decision in *United States v. Texas*.[71] Although it did not explicitly hold that Congress could not expand the sovereign and political powers of an incoming state in a compact of admission, the Court plurality cited constitutional reasons as preventing "any implied, special limitation of any of the paramount powers of the United States in favor of a State."[72]

Since 1937, the doctrine of dual federalism has been replaced by theories of "cooperative federalism." Under cooperative federalism, federal and state governments are viewed as sharing powers and functions, although national powers and interests take precedence over state sovereignty.[73] Consistent with this more expansive view of federal sovereignty, the plurality opinion in *Texas* suggested that the equal footing doctrine "prevents extension of the sovereignty of a State" into an area of paramount rights of the United States "from which the other States have been excluded, just as it prevents a contraction of sovereignty . . . which would produce inequality among the States."[74]

erenda) *with* LA. CONST. arts. III-VI (containing specific and detailed delimitation of powers, duties, and organization of three branches and of local governments). Additionally, the courts have historically validated congressional power to control the formation and content of constitutions of states entering the Union. As a result, states differ in the sovereign and political powers they exercised at admission. *See* p. 835 *supra*. The equal footing doctrine permits each state after admission to choose to exercise the same degree of sovereign and political powers as every other state. *Cf.* Case v. Toftus, 39 F. 730, 732 (C.C.D. Or. 1889) ("true constitutional equality between the states . . . extends to the right of each . . . to have and enjoy the same measure of local or self government").

71. 339 U.S. 707, 719-20 (1950); *see* Frost, *Judicial Expansion of Seaward Boundaries Above Submerged Lands*, 16 N.Y.U. INTRA. L. REV. 235, 242 (1961) (*Texas* plurality used concept of " 'converse equal footing' ").

72. 339 U.S. at 717; *see id.* at 718 (United States responsibilities with respect to "foreign commerce, the waging of war, the making of treaties, defense of the shores, and the like" compel conclusion that United States's supremacy over seabed must be unabridged).

73. *See* Corwin, *supra* note 69, at 21 ("cooperative conception of the federal relationship"). Cases after 1937 have reflected the cooperative federalist notions. *See, e.g.*, Fry v. United States, 421 U.S. 542, 547-48 (1975) (interference with state affairs by application of Economic Stabilization Act to state employees upheld as within rational congressional exercise of power); United States v. Darby, 312 U.S. 100, 124 (1941) (Fair Labor Standards Act upheld even though it affected state sovereignty; national government can "resort to all means for the exercise of a granted power"). *See generally* M. REAGAN, THE NEW FEDERALISM 21-23 (1972) (constitutional revolution of 1937 began view of federal and state cooperation in "running programs" and in "passing statutes," as state powers no longer held to impede or limit national powers). The Court has, nevertheless, recently moved to limit notions of cooperative federalism. *See* National League of Cities v. Usery, 426 U.S. 833 (1976) (Tenth Amendment affirmative limit on commerce power when legislation infringes on state sovereignty).

74. 339 U.S. at 719-20 (citation omitted).

The *Texas* plurality, however, returned to a model of dual federalism by assuming that exclusive federal control over the seabed was necessary.[75]

The Court in *Alabama v. Texas*[76] was misguided in not addressing the constitutional equal footing arguments.[77] The reasoning in *Texas* required the *Alabama* Court to determine whether the Submerged Lands Act undermined the constitutional "equality of States" so as to make them " 'different in [the] dignity and power' " that they share as co-equal members of the Union.[78] Because the *Alabama* Court did not consider the constitutional language in *Texas*, the latter opinion should not be understood to bar affirmative congressional actions that vest seabed rights in some states that are greater than those enjoyed by other states.[79]

B. *The Statutory Component of the Equal Footing Doctrine*

Ultimately, the holding in *United States v. Texas*[80] must be viewed as turning on statutory, not constitutional interpretation. Although the Constitution guarantees sovereign equality to the states, it does not ensure their economic or proprietary equality. Because state sovereignty includes the right to acquire and to dispose of property,[81] and because the Constitution gives Congress plenary power to grant federal lands to the state,[82] equality either in size or in percentage of public lands held among the states would be unrealistic.[83] Acts of admission,

75. Under dual federalism, federal and state governments were viewed as co-equals, supreme in their independent spheres. *See* p. 837 *supra*. The plurality, by coalescing imperium and dominium, returned to a view of separate and independent spheres of government, which was a touchstone of dual federalism thinking.

76. 347 U.S. 272 (1954) (per curiam).

77. *See* note 47 *supra* (Court may have believed that there was no equal footing issue involved in post-admission grant); Alabama v. Texas, 347 U.S. 272, 281 (1954) (Douglas, J., dissenting) (Court treated equal footing as "frivolous and insubstantial").

78. United States v. Texas, 339 U.S. 707, 720 (1950) (plurality opinion) (quoting Coyle v. Smith, 221 U.S. 559, 566 (1911)).

79. At most, constitutional principles merely create a rebuttable presumption that states' compacts of admission grant equal seabed rights. *See* p. 840 *infra*.

80. 339 U.S. 707 (1950).

81. This right is equal, in the absence of constitutional or statutory limitations, to that of an individual disposing of land. *See, e.g.*, South San Joaquin Irrigation Dist. v. Neumiller, 2 Cal. 2d 485, 489, 42 P.2d 64, 66 (1935); Bjerke v. Arens, 203 Minn. 501, 505, 281 N.W. 865, 866 (1938).

82. U.S. CONST. art. IV, § 3, cl. 2 (property clause); *see* Alabama v. Texas, 347 U.S. 272, 273 (1954) (per curiam) ("The power over the public land thus entrusted to Congress is without limitations.")

83. States currently vary widely in geographical size and in the extent to which the federal government owns public lands within their boundaries. *See, e.g.*, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1977, at 197, 227 (1977).

moreover, reveal a wide variation in the property rights possessed by particular states upon their entry into the Union. Texas and Florida, for example, came into the Union with generous grants of public lands, but most other states have received very limited property grants from Congress in their compacts of admission.[84]

Interpreting the statement in *Texas* that the equal footing doctrine has a "direct effect on certain property rights,"[85] specifically on the right to exploit submerged lands, remains a problem. This finding can be harmonized with the holding in *Alabama v. Texas*[86] only if *Texas* is understood to have involved statutory interpretation of the equal footing clause in the state's act of admission.[87] The act did not discuss the submerged lands issue, so the *Texas* plurality faced the question whether the state could retain prior title by implication. The Court plurality held only that the Constitution prevented such an implication, not that Congress could not, if it had so desired, have made an explicit grant of title.[88] The constitutional language supported the plurality's presumption that Texas had no greater property rights than other states. Such a presumption could have been rebutted by a showing of an express provision in the compact of admission that vested dominion in the incoming state.[89]

The Court in *Pollard's Lessee v. Hagan*[90] held that property rights to the beds of inland waters belong to the states.[91] The *Tidelands Cases* reached the opposite result for offshore lands, because "national interests, responsibilities, and therefore national rights are paramount."[92] The *Alabama* Court assumed, without so deciding, that seabed rights were mere property rights.[93] The failure of the *Alabama* Court lay in not overturning the holding in the *Tidelands Cases* that seabed rights were interests "so subordinated to political rights as in substance to coalesce and unite in the national sovereign."[94] By upholding the federal power to cede submerged lands, the *Alabama* Court overturned the reasoning of *Texas*[95] that although "*dominium* and *imperium* are normally separable and separate," in some cases "property interests are so subordinated to the rights of sovereignty as to follow sovereignty."[96] No apparent reason exists to allow the separation of property from sovereignty in statutes like the Submerged Lands Act, while preventing such a separation in acts of admission. Therefore, the constitutionally based presumption of federal control over the seabed imposed by the equal footing doctrine can be overcome. Puerto Rico need only secure Congress's agreement to an express grant in its act of admission.

84. Unlike other states, Texas was allowed to retain its vacant and unappropriated lands. This retention was permitted in order that the state would be able to pay the debts and liabilities it had incurred as a Republic. Joint Resolution for annexing Texas to the United States, J. Res. 8, 28th Cong., 2d Sess. 797 (1845); *see* P. Gates, History of Public Land Law Development 316 (1968) (at admission, Florida was granted 62%, Louisiana 38%, and Alaska 28% of public land areas with remainder retained by federal government).

85. 339 U.S. at 716 (plurality opinion).

86. 347 U.S. 272 (1954) (per curiam).

87. *See* United States v. Texas, 339 U.S. 707, 715 (1950) (plurality opinion) (plurality held that dominium over Texas's seabed vested in federal government because "'equal footing' clause of the Joint Resolution admitting Texas to the Union disposes of . . . the controversy" of control over area).

88. *See* p. 838 *supra*.

89. The *Texas* plurality found that Texas's historical proof of dominium, while a Republic, over its three marine leagues seabed was insufficient to overcome the presumption that such dominium had been relinquished. United States v. Texas, 339 U.S. 707, 717-18 (1950). Subsequently, the *Maine* Court held that Congress had exercised its "paramount national powers" by transferring seabed rights to the states in the Submerged Lands Act. United States v. Maine, 420 U.S. 515, 524 (1975). It thus appears that Congress can disavow federal control conferred by the equal footing doctrine over the seabed bordering any state by an express provision in the compact of admission.

90. 44 U.S. (3 How.) 212 (1845).

91. *Id.* at 230; *see* p. 830 *supra*.

92. United States v. California, 332 U.S. 19, 36 (1947); *see* United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion); United States v. Louisiana, 339 U.S. 699, 704 (1950).

93. 347 U.S. at 273 (per curiam).

94. United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion).

95. *See* p. 834 *supra*.

96. 339 U.S. at 719 (plurality opinion) (footnote omitted). *But cf.* p. 840 *supra* (harmonizing results of *Alabama* and *Texas*).

97. Alabama v. Texas, 347 U.S. 272, 273-74 (1954) (per curiam) (upholding constitutionality of Submerged Lands Act).

98. United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion).

99. To avoid confusion, this discussion will use national "supremacy" to refer to the sovereignty of the federal as against the state governments. This concept involves federal supremacy in the areas designated by the Constitution. The word "sovereignty" in the international sense denotes the plenary powers of individual nations as against one another and will be used as such throughout this discussion.

100. *See* p. 834 *supra*; p. 843 *infra*.

The Commonwealth of Puerto Rico can claim the sovereign right to explore and exploit its seabed under international law. The Continental Shelf Convention, *supra* note

III. Seabed Rights as Property Rights

The Court has ruled that a grant of three marine leagues to some states does not undermine the constitutional equality of states.[97] The question remains whether a congressional grant of seabed rights of 200 miles to Puerto Rico on admission to the Union would be an unconstitutional "subtraction in favor of" Puerto Rico "from the national sovereignty of the United States."[98] Such a grant would not, however, compromise national supremacy,[99] for the right to exploit the seabed, under both American and international law, is alienable.[100] Such a

grant should be upheld against any equal footing challenge by other states[101] or by the Justice Department.[102]

Congress, a court should hold, can alienate seabed rights in any way it chooses. It may, for example, make such an express provision in a compact of admission, because a commingling of sovereignty with property rights is no more essential in the 200-mile zone than it is in the smaller zone at issue in *Alabama v. Texas*.[103] Any other conclusion would be at odds with principles of American and international law that have recognized not only the difference between imperium and dominium over the seabed, but also the difference between sovereignty over the sea and sovereignty over the seabed.[104]

The Truman Proclamation,[105] the first claim by a major coastal nation to rights over the continental shelf and its resources,[106] avoided use of the word "sovereignty" and only referred to "jurisdiction and control" in order to signify that the United States' claim extended only to the right to exploit the resources of the shelf, not to sovereignty

4, which the United States has ratified, states that "[t]he coastal State exercises over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources," *id.* art 2(1). In the *North Sea Continental Shelf Cases*, the International Court of Justice held that the right to explore the continental shelf and exploit its natural resources was inherent in the coastal State—the rights existed *"ipso facto* and *ab initio."* [1969] I.C.J. 4, 22. One study has concluded that the current United States claim to the continental shelf of the Commonwealth departs from prevailing international law and practice under which overseas departments and associated states, without representative votes in metropolitan governments, exercise control over the coastal seabed. T. FRANCK, CONTROL OF SEA RESOURCES BY SEMI-AUTONOMOUS STATES 27-29 (1978).

A coastal State's exclusive right to exploit the seabed does not preclude it from transferring its right, as long as the consent is express. Continental Shelf Convention, *supra* note 4, art. 2(2). Therefore, under international law, Puerto Rico and the United States can agree in a compact of admission who will receive the benefits of exploiting the seabed. *See Submerged Lands Act: Hearings on S.J. Res. 13, S. 294, S. 107, S. 107 Amend., S.J. Res. 18 Before the Comm. on Interior and Insular Affairs*, 83d Cong., 1st Sess. 1066 (1953) (Jack Tate, Deputy Legal Adviser, Dep't of State) (international community unconcerned about way United States divides its rights over seabed with states) [hereinafter cited as *Hearings on Submerged Lands Act*].

101. In Alabama v. Texas, 347 U.S. 272 (1954) (per curiam) states challenged a disproportionate grant of seabed rights to other states. *See* p. 835 *supra*.

102. The Justice Department brought the submerged lands cases challenging the right of Gulf states to the three marine leagues limit. *See* United States v. Florida, 363 U.S. 121 (1960); United States v. Louisiana, 363 U.S. 1 (1960). The executive need not agree with a congressional grant of seabed rights to a state and could therefore seek to overturn a congressional grant in a compact of admission. *Cf.* Veto of Bill Concerning Title to Offshore Lands, 1952-1953 PUB. PAPERS 379 (Truman veto of first Submerged Lands Act).

103. 347 U.S. 272 (1950) (per curiam).

104. *See* Daniel, *Sovereignty and Ownership in the Marginal Sea*, 5 BAYLOR L. REV. 243, 248-56 (1953) (distinction between ownership of seabed and sovereignty over waters, and dual rights in marginal sea).

105. Exec. Proclamation No. 2667, 3 C.F.R. 67, 68 (1945).

106. *See* A. Sinjela, Land-Locked States and the Contemporary Ocean Regime 303-05 (1978) (unpublished J.S.D. dissertation, Yale Law School) (on file with *Yale Law Journal*) (prior to 1945, few claims to continental shelf made and those made largely concerned with fishing conservation).

over the sea.[107] Both Congress and executive officials premised the Submerged Lands Act on the separability of national supremacy and property rights over the seabed.[108] Finally, the separability of property and full sovereignty rights in the high seas was recently evidenced by American creation of a 200-mile zone of "exclusive fishery management authority," in which the United States claimed the power to regulate one resource of the high seas without asserting sovereignty over the area.[109]

The Court in *United States v. California*[110] viewed the possibility of international obligations concerning the seabed as bolstering the necessity for national control of the area.[111] The international community, however, has generally followed the American view that sovereign rights over the high seas are separate from exploitation rights over the resources of sea lands.[112]

Article 2 of the Continental Shelf Convention of the 1958 Geneva Convention on the Law of the Sea accorded to coastal states the exclusive power to exercise "over the continental shelf sovereign rights for the purpose of exploring it and exploiting its natural resources."[113] The Informal Composite Negotiating Text of the ongoing Law of the Sea Conference incorporates the same provision of coastal state right to explore the shelf.[114] Neither provision in any way prevents a coastal state from consenting to alienate these rights.[115] The Composite Text

107. Exec. Proclamation No. 2667, 3 C.F.R. 67, 68 (1945); *id.* ("The character as high seas of the waters above the continental shelf and the right to their free and unimpeded navigation are in no way thus affected.")

108. *See, e.g., Hearings on Submerged Lands Act*, *supra* note 100, at 512-14 (Douglas McKay, Secretary of Interior) (United States controls submerged lands, regardless of property rights); S. REP. No. 133, 83d Cong., 1st Sess. 5-6, *reprinted in* [1953] U.S. CODE CONG. & AD. NEWS 1474, 1479 (Submerged Lands Act grants property rights, not constitutional rights). *But see* pp. 846-47 *infra* (federal government by invoking eminent domain can recapture any seabed grants).

109. Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, §§ 101-102, 90 Stat. 336 (codified at 16 U.S.C. §§ 1811-1812 (1976)).

110. 332 U.S. 19 (1947).

111. *Id.* at 35.

112. *See* 4 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 789-882 (1965) (development and acceptance of continental shelf doctrine). Some nations continue to claim that the shelf is inseparable from the high seas and therefore not subject to appropriation. *See* 2 Third U.N. Conference on the Law of the Sea (Caracas, Venez.) (18th mtg.) 152, U.N. SALES No. E. 775, v.4 (July 29, 1974) (Mr. Upadhyaya, Nepal delegate). Other nations have claimed sovereignty over both the shelf and the high seas. *See* 1 S. LAY, R. CHURCHILL & M. NORDQUIST, NEW DIRECTIONS IN THE LAW OF THE SEA 15-16 (1973) (Brazilian claim of complete sovereignty).

113. Continental Shelf Convention, *supra* note 4, art. 2(1); *see id.* art. 1 (right to exploit shelf to limits of exploitability); *id.* art. 3 ("rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters as high seas").

114. Composite Text, *supra* note 4, arts. 76, 77(1) (coastal state right to exploit seabed up to distance of 200 nautical miles).

115. *See id.* art. 77(2) (rights to shelf exclusive unless exploration consented to by coastal state); Continental Shelf Convention, *supra* note 4, art. 2(2) (same).

also proposes the creation of a 200-mile economic zone[116] under which coastal states have absolute rights "for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the sea-bed and subsoil and the superjacent waters."[117] In short, the right to exploit the seabed, properly defined, is simply a property right not necessarily commingled with national supremacy. Thus a grant to Puerto Rico of seabed rights at admission would not be a "subtraction in [its] favor . . . from the national sovereignty of the United States."[118]

IV. Seabed Grant Proposal and Its Limitations

The equal footing doctrine's rebuttable presumption of national property rights to the seabed makes the right to exploit seabed resources a negotiable condition in Puerto Rico's bargaining for admission.[119] Therefore Puerto Rico should seek a specific grant of seabed rights in a compact of admission. The federal government can, however, constitutionally regulate or terminate the rights to exploit the seabed secured in a compact. The main protection available for the island against a "taking" of its seabed rights is an explicit calculation of just compensation in its compact of admission.

116. The economic zone is an area "200 nautical miles from the baselines from which the breadth of the territorial sea is measured." Composite Text, *supra* note 4, art. 57. In the economic zone the coastal state has absolute rights of exploitation, *see* note 117 *infra*, and jurisdiction for purposes of research, environmental preservation, and construction, *see* Composite Text, *supra* note 4, art. 56(1)(b).

117. Composite Text, *supra* note 4, art. 56(1)(a). Control over the economic zone and control over the continental shelf involve a concomitant 200-mile limit. *See id.* arts. 57, 76. Although sovereign rights for exploitation purposes are absolute in the shelf, *see id.* art. 77(2), coastal states nevertheless have an affirmative duty under certain conditions to give access to other States in the economic zone, *see, e.g., id.* art. 69 (land-locked state's right to participate in exploitation of economic zones of adjoining coastal states).

118. United States v. Texas, 339 U.S. 707, 719 (1950) (plurality opinion).

119. Puerto Rico's bargaining position would be strengthened if it could establish ownership of the seabed as a commonwealth. *See* notes 5 & 100 *supra* (controversy over ownership of island's seabed; island's right to continental shelf under international law). Congress's grant to the states in the Submerged Lands Act of 1953, Pub. L. No. 83-31, § 3, 67 Stat. 30 (codified at 43 U.S.C. § 1311(a) (1970)), was motivated by a desire to restore historic title to the states. *See* note 38 *supra*. Historic title is not, however, necessary to Puerto Rico's demands: congressional power to cede federal lands is "plenary" and "without limitation." Alabama v. Texas, 347 U.S. 272, 273-74 (1954) (per curiam). In construing the Submerged Lands Act, the Court relied on historic title to the seabed only in searching for congressional intent to grant submerged lands to the state at admission. *See* note 48 *supra*. Federal control of the island's seabed resources while it remains a commonwealth would not bar the island from claiming the resources at the time it seeks admission.

A. *Considerations for a Specific Grant*

Puerto Rico may seek to include in any compact of admission language granting the island the right to explore and exploit the natural resources of the seabed to the extent recognized by the international community.[120] In order to ensure that the grant of seabed rights to Puerto Rico will be sufficiently specific, the language used in other grants of seabed rights should be replicated:[121] "The term 'natural resources' includes, without limiting the generality thereof, oil, gas, and all other minerals,"[122] including sand, gravel or coral,[123] and all other living organisms sedentary to the seabed.[124] Puerto Rico's demands should seek to encompass all rights recognized by the United States in international agreements.[125] The grant should also follow the Submerged Lands Act in affirming the imperium rights of the United States.[126]

120. Current international law favors the recognition of sovereign rights over 200 miles of seabed. *See* Composite Text, *supra* note 4, arts. 56, 57. At minimum, Puerto Rico could seek the right to explore its seabed to the limits of exploitability, *see* note 5 *supra*, a right recognized in the Continental Shelf Convention, *supra* note 4, art. 1, which the United States has ratified. Ratifications and Accessions to the Conventions, U.N. Doc. St. Leg./3 Rev. 1 (Apr. 12, 1961).

121. It is beyond the scope of this Note to propose the exact language of a seabed grant. Such language will require extensive negotiations because many problems of definition and jurisdiction exist. *Cf.* Note, *Jurisdiction Over the Seabed: Persistent Federal-State Conflicts*, 12 URB. L. ANN. 291, 297-99 (1976) (establishment of baselines from which to measure state control, shifting of coastlines, and pollution and environmental controls are issues currently in dispute between federal and state governments). In addition, if the United States were to sign an international agreement such as the Composite Text, *supra* note 4, before the island's bid for statehood, the language of a seabed grant would have to account for any international obligations the federal government had incurred.

122. Submerged Lands Act of 1953, § 2, 43 U.S.C. § 1301(e) (1970).

123. In the Conveyance of Submerged Lands to Territories Act of 1974, Pub. L. No. 93-435, § 1, 88 Stat. 1210 (current version at 48 U.S.C. § 1705(a) (Supp. V 1975)), the United States gave Guam, the Virgin Islands, and American Samoa title to their marginal sea. The grant excepted oil, gas, and other minerals from the grant but included "coral, sand and gravel." The inclusion of both phrases in the proposed grant would leave no doubt as to the meaning of Puerto Rico's demands for "mineral resources."

124. Composite Text, *supra* note 4, art. 77(4) (natural resources of shelf include "living organisms belonging to sedentary species").

125. The rights could include those agreed upon in the Composite Text, *supra* note 4, if it should be ratified or in the Continental Shelf Convention, *supra* note 4, which has already been ratified by the United States, *see* note 120 *supra*.

126. Submerged Lands Act of 1953, § 6, 43 U.S.C. § 1314(a) (1970):

> [T]he United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources . . . vested in . . . the respective States. . . .

Congress viewed this section as superfluous, but included it in the Act to safeguard against

B. *The Limits of a Grant to Exploit Seabed Resources*

The seabed is directly related to federal exercise of powers over national defense, the conduct of foreign affairs, world commerce, and navigation.[127] In order to effect these constitutional powers, Congress is empowered both to enact laws regulating the seabed[128] and to take state submerged lands.[129] Congress can, therefore, subsequently regulate or take back in exercise of its constitutional powers any right that it might grant to Puerto Rico in its compact of admission.

Such regulation or taking after admission is highly probable. Federal energy and environmental policies have recently led Congress to regulate seabed mining.[130] Treaties involving the seabed will likely limit exploitation by guaranteeing freedom of navigation and cable placement.[131]

The one safeguard that would be available to Puerto Rico if Congress were to take back seabed rights granted in a compact of admission is that provided by the Fifth Amendment: any taking by the federal government to execute its constitutional powers must include just compensation.[132] If the federal government acquires ownership of the

the national sovereignty concerns expressed in the *Tidelands Cases*. *See Hearings on Submerged Lands Act*, *supra* note 100, at 1368 (Sen. Jackson) ("[T]he constitutional provision . . . is purely surplus anyway. If we have exclusive rights under the Constitution, there is nothing we can do to change it.")

127. The relation of the seabed to the exercise of these important federal powers is evidenced by the difficulties that concerns with military defense, foreign affairs, commerce, and navigation created in developing a consistent United States' policy on the law of the sea. *See* Hollick, *Bureaucrats at Sea*, in NEW ERA OF OCEAN POLITICS 1-2 (A. Hollick & R. Osgood eds. 1974) (law of sea encompasses complex array of issues that resulted in shifting American policies).

128. *See, e.g.*, United States v. Rands, 389 U.S. 121, 123 (1967) ("power to regulate navigation confers upon the United States a 'dominant servitude'" that empowers it to take submerged lands without compensation); United States v. Virginia Elec. & Power Co., 365 U.S. 624, 627-28 (1961) (similar).

129. *See, e.g.*, Oklahoma *ex rel.* Phillips v. Guy F. Atkinson Co., 313 U.S. 508, 534 (1941) (Congress empowered to take state's submerged lands in exercise of commerce power); California v. United States, 395 F.2d 261, 268 (9th Cir. 1968) (United States can condemn state's submerged lands but must pay compensation; lands not valueless because submerged and unused).

130. *See* 43 U.S.C.A. § 1348 (West Supp. 1978) (safety regulations for exploitation of outer continental shelf).

131. *See* Composite Text, *supra* note 4, art. 58 (freedom of navigation in economic zone guaranteed by coastal states); *id.* art. 79 (right to lay submarine cables and pipelines on continental shelf given to all signatories).

132. U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation"). Although it need not compensate states for submerged lands taken for the purpose of regulating navigation, *see* note 128 *supra*, the federal government must provide compensation for the condemnation of state property for any other public purpose. *See, e.g.*, United States v. Carmack, 329 U.S. 230, 242 (1946); California v. United States, 395 F.2d 261, 263-64, 264 n.5 (9th Cir. 1968).

Puerto Rican seabed or regulates it so as to constitute a "taking,"[133] Puerto Rico should be reimbursed. Although environmental or navigational limitations are likely to be viewed as regulation and therefore noncompensable,[134] American alienation of seabed rights by treaty should be treated as a taking.[135]

Even though there must be compensation for any taking, Puerto Rico's property interest in the seabed might be undervalued. To enforce the constitutional mandate of just compensation, courts rely on "the concept of market value: the owner is entitled to the fair market value of the property at the time of the taking."[136] The "highest and most profitable use for which the property is adaptable and needed, or is likely to be needed in the near future" must be considered in determining the fair market value.[137] Future use must be within a reasonable time,[138] based on a known and provable market,[139] and exploitable without substantial expenditure of capital.[140] An owner, such as Puerto Rico, would be compensated for the "highest and most profitable use" to which it put its seabed at the time of taking. The

133. Although public regulation can reduce market value of private land without compensation, *see, e.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding zoning ordinance as within state's police power), an owner must be compensated if deprived of all reasonable economic use for the property regulated, *see* Costonis, *"Fair" Compensation and the Accommodation Power: Antidotes for the Taking Impasse in Land Use Controversies*, 75 COLUM. L. REV. 1021, 1051 (1975) (under reasonable beneficial use test, landowner allowed reasonable economic return on property). *See generally* C. BERGER, LAND OWNERSHIP AND USE 630-31 (2d ed. 1975) (four proposals commonly used to reconcile "police power vs. taking").

134. *See* United States v. 422.978 Square Feet of Land, 445 F.2d 1180, 1184 n.7 (9th Cir. 1971) (history of Supreme Court cases holding regulation for navigational purposes noncompensable); *cf.* Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650, 666-67 (1958) (regulation to prevent public harm within police power and noncompensable).

135. *Cf.* United States v. 50 Foot Right of Way or Servitude, In, Over and Across Certain Land, 337 F.2d 956, 960 (3d Cir. 1964) (taking of land for pipeline to aid navigation noncompensable; compensable if taken for any other reasons).

136. United States v. Reynolds, 397 U.S. 14, 16 (1970) (footnote omitted); *see* Danforth v. United States, 308 U.S. 271, 283 (1939) (just compensation means value at time of taking).

137. United States v. 1,291.83 Acres of Land, 411 F.2d 1081, 1084 (6th Cir. 1969); *see* Olson v. United States, 292 U.S. 246, 255 (1934) ("highest and most profitable use" test).

138. *See* note 137 *supra* (citing cases).

139. United States v. 1,291.83 Acres of Land, 411 F.2d 1081, 1084 (6th Cir. 1969); Mills v. United States, 363 F.2d 78, 81 (8th Cir. 1966). Evidence of minerals may be used in determining the market value of land, but future demand for the mineral must have some objective support. "Mere physical adaptability to a use does not establish a market." United States v. Whitehurst, 337 F.2d 765, 771-72 (4th Cir. 1964) (footnote omitted).

140. United States v. 1291.83 Acres of Land, 411 F.2d 1081, 1084 (6th Cir. 1969); United States v. 2,635.04 Acres of Land, 336 F.2d 646, 648 (6th Cir. 1964). The mere existence of mineral deposits is not sufficient; the minerals must be exploitable. *See* Mills v. United States, 363 F.2d 78, 81 (8th Cir. 1966).

minerals of the submerged land would be treated as one element affecting the market value of the lands taken, but would not be separately valued.[141] Puerto Rico would not be compensated for the quantity of minerals in the lands or for any unknown minerals the lands contained.[142]

Puerto Rico and the United States could agree that compensation be provided for those losses that courts normally find noncompensable, and could provide at admission a formula for calculating the compensation. The federal right to eminent domain cannot be abridged by contract,[143] but the "Fifth Amendment does not prohibit landowners and the Government from agreeing between themselves as to what is just compensation for property taken. . . . Nor does it bar them from embodying that agreement in a contract. . . ."[144]

Various methods of adjusting the constitutional measure of just compensation could be devised. For example, a simple reasonable return above fair market value could be agreed on to compensate for any unknown uses of the lands at the time of the taking. Second, the quantity and quality of minerals in the lands could be estimated at the time of taking and then multiplied by a fixed price per unit agreed on in the compact of admission.[145] A court could be directed in the compact of admission to determine the future income stream by this multiplication method, then subtract expected cost of production—in essence, to capitalize profits.[146] Puerto Rico could demand that this capitalized estimate serve as the measure of compensation.

141. Courts have not permitted separate valuation of the quantity and quality of minerals, multiplied by a fixed price per unit because such valuation is speculative and uncertain. *See, e.g.*, Georgia Kaolin Co. v. United States, 214 F.2d 284, 286 (5th Cir. 1954); United States v. Land in Dry Bed, 143 F. Supp. 314, 317-18 (S.D. Cal. 1956); 4 J. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 13.22 (P. Rohan 3d rev. ed. 1977) (valuation of lands containing mineral resources).

142. *See* note 141 *supra* (citing cases); Mills v. United States, 363 F.2d 78, 81 (8th Cir. 1966) (minerals in land must be known and exploitable).

143. *See* Georgia v. Chattanooga, 264 U.S. 472, 480 (1924) ("[E]minent domain is an attribute of sovereignty . . . . It cannot be surrendered, and if attempted to be contracted away, it may be resumed at will." (citations omitted)); Contributors to Pa. Hosp. v. Philadelphia, 245 U.S. 20, 23 (1917) (contract restraining eminent domain "inefficacious for want of power").

144. Albrecht v. United States, 329 U.S. 599, 603 (1947) (citation omitted); *see* United States v. Fuller, 409 U.S. 488, 494 (1973) ("Congress may . . . provide . . . that particular elements of value or particular rights be paid for even though in the absence of such provision the Constitution would not require payment.")

145. One possibility is to agree to use the fair market value of the minerals at the time of the taking as the fixed price. Of course this method can be used only when quality and quantity can accurately be estimated.

146. One court has accepted the multiplication or capitalization of profits method in an eminent domain context. *See* State Highway Comm'n v. Nunes, 233 Or. 547, 559, 379 P.2d 579, 585 (1963). *See generally* Note, *Valuation in Eminent Domain Cases—Use of the Multiplication Method in Valuing Mineral Deposits*, 56 ALB. L. REV. 753 (1972) (arguing for this method).

Although it requires speculation about future markets, technology, and return on investment, the last method is well-known in the law.[147] The valuation method is irrelevant unless a taking occurs; but if seabed rights are taken, then some speculation is preferable to the alternative of noncompensation for potential minerals in the seabed.

Conclusion

The American experience with colonialism in the early half of this century[148] has left the United States with responsibility for several small, economically poor dependencies.[149] Some of these, like Puerto Rico, may seek statehood unless they are accorded a greater measure of self-government.[150] Accommodations between the federal government and an incoming state such as Puerto Rico, involving, *inter alia*, rights to the seabed, could help the new state to overcome its economic problems. This Note has shown that for Puerto Rico the only bar to the creation of such rights is political, not legal. The question is whether the present fifty states would be willing to grant to Puerto Rico a right that states have not obtained or preserved for themselves.

147. *See, e.g.*, State Highway Comm'n v. Nunes, 233 Or. 547, 556, 379 P.2d 579, 584 (1963) (stating that frequently impossible as practical matter not to use capitalization method in valuation); *In re* Atlas Pipeline Corp., 9 S.E.C. 416, 421-40 (1941) (Chapter X of Bankruptcy Act requires courts to judge whether reorganization plans are "fair and equitable, and feasible"; judgment necessitates projections of earnings, remaining economic life, and capitalization rates for corporations); I.R.C. § 167 (projections must be made of useful life and obsolescence of assets in computing depreciation).

148. *See* J. PRATT, AMERICA'S COLONIAL EXPERIMENT 58 (1950) (Spanish American War "opened the door of a colonial career to the United States"); Woodward, *Empire Beyond the Seas*, in THE NATIONAL EXPERIENCE 518-37 (J. Blum 2d ed. 1968) (era of manifest destiny, imperialistic stirrings, and white man's burden).

149. *See* note 148 *supra* (citing sources); Letter from Ruth G. Van Cleve, Director, Office of Territorial Affairs, Dep't of the Interior (Apr. 4, 1978) (on file with *Yale Law Journal*) (compiling per capita income of American territories); Office of the Commonwealth of Puerto Rico, Basic Industrial Facts on Puerto Rico—1975 (1976) (reporting island's per capita income).

150. Some sentiment for statehood in the future has, for example, also been reported in the Virgin Islands. *See* Macridis, *Political Attitudes in the Virgin Islands*, in VIRGIN ISLANDS 193, 202 (J. Bough & R. Macridis eds. 1970).

It is conceivable that Puerto Rico would settle for less than statehood, if the arrangement conferred greater autonomy than that provided by the current commonwealth status. For example, in 1975, after two years of deliberations, the Ad Hoc Advisory Group on Puerto Rico, a committee composed of presidential appointees and delegates chosen by the Governor of Puerto Rico, made its recommendations for greater island control over its economic programs and international affairs. *See* REPORT OF THE AD HOC ADVISORY GROUP ON PUERTO RICO, COMPACT OF PERMANENT UNION BETWEEN PUERTO RICO AND THE UNITED STATES 87-100 (1975). President Ford's New Year's Eve statehood proposal, however, was made in lieu of an endorsement of the proposed compact. *Text of Ford Puerto Rico Statement*, N.Y. Times, Jan. 1, 1977, at 5, col. 1. The President apparently found that statehood within the American system was more attractive than a more autonomous form of commonwealth status.

Returning Majesty To The Law and Politics: A Modern Approach*

Hon. Sonia Sotomayor† and Nicole A. Gordon††

Even after participating in many different aspects of the practice of law, it is still possible to retain an enthusiasm and love for the law and its practice. It is also exciting to address future lawyers about the practice of law. This is not easy to do, unfortunately, in the context of recurring public criticism about the judicial process.[1]

The public expects the law to be static and predictable. The law, however, is uncertain and responds to changing circumstances. To the public, justice means that an obviously correct conclusion will be reached in every case. But what is "correct" is often difficult to discern when the law is attempting to balance competing interests and principles, such as the need to protect society from drugs as opposed to the need to enforce our constitutional right to be free from illegal searches and seizures.[2] A con-

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* This Article is based upon a speech that Judge Sotomayor delivered in February 1996 as part of the Donahue Lecture Series. The Donahue Lecture Series is a program instituted by the *Suffolk University Law Review* to commemorate the Honorable Frank J. Donahue, former faculty member, trustee, and treasurer of Suffolk University. The Lecture Series serves as a tribute to Judge Donahue's accomplishments in encouraging academic excellence at Suffolk University Law School. Each lecture in the series is designed to address contemporary legal issues and expose the Suffolk University community to outstanding authorities in various fields of law.

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1. *See, e.g.*, Katharine Q. Seelye, *Dole, Citing 'Crisis' in the Courts, Attacks Appointments by Clinton*, N.Y. TIMES, Apr. 20, 1996, at A1 (describing Senator Dole's criticism of liberal ideology of Clinton judicial appointments and American Bar Association); John Stossel, *Protect Us From Legal Vultures*, WALL ST. J., Jan. 2, 1996, at 8 (asserting damage manufacturers have done to society "trivial" compared with harm lawyers do); Don Van Natta Jr., *Group Urges More Scrutiny For Lawyers*, N.Y. TIMES, Nov. 10, 1995, at B1 (discussing New York State committee's recommendations for improving legal system and combatting public criticism).

2. *See generally* 5 WAYNE R. LAFAVE, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT (3d ed. 1996) (explaining exclusionary rule protects constitutional right to be secure against unreasonable searches and seizures).

fused public, finding itself at odds with the results of particular judicial decisions, experiences increased cynicism about the law.[3]

Unfortunately, lawyers themselves sometimes feed that cynicism by joining a chorus of critics of the system, instead of helping to reform it or helping the public to understand the conflicting factual claims and legal principles involved in particular cases.[4] Similarly, instead of attempting to control criminal or unethical conduct occurring in our profession, and promoting the honorable work of most of us, many lawyers respond by denigrating the professionals in certain practice areas, like personal injury law. Further, many neglect to focus on the core issues that rightly trouble the public, such as whether there is fraud and deceit in the prosecution of claims, and if so, what we should do about it.

Today, we need to discuss how we can satisfy societal expectations about "The Law" and help create a better atmosphere in which public officials, and especially lawyers and judges, can inspire more confidence and respect for the "majesty of the law" and for the people whose professional lives are devoted to it.

I. THE LAW AS A DYNAMIC SYSTEM

The law that lawyers practice and judges declare is not a definitive, capital "L" law that many would like to think exists. In his classic work, *Law and the Modern Mind*, Jerome Frank aptly summarized the paradox existing in society's attitude towards law and its practitioners:

> The lay attitude towards lawyers is a compound of contradictions, a mingling of respect and derision. Although lawyers occupy leading positions in government and industry, although the public looks to them for guidance in meeting its most vital problems, yet concurrently it sneers at them as tricksters and quibblers.
>
> Respect for the bar is not difficult to explain. Justice, the protection of life, the sanctity of property, the direction of social control—these fundamentals are the business of the law and of its ministers, the lawyers. . . .

3. *See Judge Baer's Mess*, N.Y. TIMES, Apr. 3, 1996, at A14 (criticizing federal judge's reversal of initial exclusion of drugs and confession as unconstitutional seizure); *see also* Bruce D. Collins, *Layman's View of Lawyers Ignores the Bar's Good Deeds*, CORP. LEGAL TIMES, Mar. 1996, at 8 (expressing concern that public may judge entire profession based on mass tort and divorce attorneys). According to one editorial, "[o]ne of the major troubles with most lawyers is that they actually believe their profession is making the United States a better place to live." *Time For Real Legal Reform Is Now, Before Lawyers Bring Nation Down, Series: The Trouble with Lawyers*, FT. LAUDERDALE SUN-SENTINEL, Jan. 4, 1996, at 14A. Further, the newspaper opined that lawyers' "continued assertion that the legal system works in the best interest of the nation demonstrates the immense human capacity for self-delusion." *Id.*

4. *See* Max Boot, *Stop Appeasing the Class Action Monster*, WALL ST. J., May 8, 1996, at A15 (detailing how corporate mass-tort defense lawyers criticize class actions yet offer few alternatives or solutions).

> But coupled with a deference towards their function there is cynical disdain of the lawyers themselves. . . . The layman, despite the fact that he constantly calls upon lawyers for advice on innumerous questions, public and domestic, regards lawyers as equivocators, artists in double-dealing, masters of chicane.[5]

Frank, a noted judge of the Court of Appeals for the Second Circuit and a founder of the school of "Legal Realism," postulated that the public's distrust of lawyers arises because the law is "uncertain, indefinite, [and] subject to incalculable changes," while the public instead needs and wants certainty and clarity from the law.[6] Because a lawyer's work entails changing factual patterns presented within a continually evolving legal structure, it appears to the public that lawyers obfuscate and distort what should be clear. Frank, however, pointed out that the very nature of our common law is based upon the lack of certainty:

> The constant development of unprecedented problems requires a legal system capable of fluidity and pliancy. Our society would be strait-jacketed were not the courts, with the able assistance of the lawyers, constantly overhauling the law and adapting it to the realities of ever-changing social, industrial and political conditions; although changes cannot be made lightly, yet law must be more or less impermanent, experimental and therefore not nicely calculable. *Much of the uncertainty of law is not an unfortunate accident: it is of immense social value.*[7]

Frank believed that in the complex, fast-paced modern era, lawyers do themselves a disservice by acceding to the public myth that law can be certain and stable. He advocated that lawyers themselves accept the premise that law is not a fixed concept and that change in the law is inevitable and to be welcomed: "Without abating our insistence that the lawyers do the best they can, we can then manfully [sic] endure inevitable short-comings, errors and inconsistencies in the administration of justice because we can realize that perfection is not possible."[8]

Frank's thesis, set forth in 1930, should continue to attract examination today. It supports a pride that lawyers can take in what they do and how they do it. The law can change its direction entirely, as when *Brown v. Board of Education*[9] overturned *Plessy v. Ferguson*,[10] or as the common

5. JEROME FRANK, LAW AND THE MODERN MIND 3 (Anchor Books 1963) (1930).

6. *Id.* at 5. In the preface to the sixth printing of LAW AND THE MODERN MIND, Frank took issue with the notion that his theories and their advocates constituted a school. *Id.* at viii-xii. Instead, Frank preferred to be viewed as a "factual realist" or as he described himself, a "fact skeptic" as opposed to a "rule skeptic." *Id.* at xii.

7. *Id.* at 6-7 (footnotes omitted).

8. *Id.* at 277.

9. 347 U.S. 483 (1954).

10. 163 U.S. 537 (1896).

law has gradually done by altering the standards of products liability law directly contrary to the originally restricted view that instructed "caveat emptor."[11] As these cases show, change—sometimes radical change—can and does occur in a legal system that serves a society whose social policy itself changes. It is our responsibility to explain to the public how an often unpredictable system of justice is one that serves a productive, civilized, but always evolving, society.

Lawyers must also continually explain various reasons for the law's unpredictability. First, as Frank explains, laws are written generally and then applied to different factual situations.[12] The facts of any given case may not be within the contemplation of the original law.[13] Second, many laws as written give rise to more than one interpretation (or, as happens among the circuit courts, differing or even majority and minority views).[14] Third, a given judge (or judges) may develop a novel approach to a specific set of facts or legal framework that pushes the law in a new direction.[15] Fourth, the function of the law at a trial is not simply to provide a framework to search for the truth, as understood by the public, but it is to do so in a way that protects constitutional rights.[16] Against these and other constraints, including, as Frank observed, an unknown factor—i.e., which version of the facts a judge or jury will credit—competent lawyers are often unable to predict reliably what the outcome of a particular case will be for their clients.[17]

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11. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §§ 95-96, at 677-83 (5th ed. 1984) (outlining movement from notion of caveat emptor to liability for losses caused by defective products); RESTATEMENT (SECOND) OF TORTS § 402A cmt. b (1965) (detailing common law evolution of liability for defective products).

12. *See* FRANK, *supra* note 5, at xii (describing how courts apply legal rules to unique cases).

13. *See id.* at 127-28 (criticizing mechanistic approach to law that would treat people like mathematical entities to achieve predictability).

14. *See id.* at 121 (discussing statistical evidence concerning difference between judges).

15. *See* Jeremy Paul, *First Principles*, 25 CONN. L. REV. 923, 936 (1993) (discussing how cases of first impression force judges to create law and affect law's unpredictability).

16. *See* United States v. Filani, 74 F.3d 378, 383-84 (2d Cir. 1996) (discussing varied goals of the trial in American jurisprudence). In *Filani*, the United States Court of Appeals for the Second Circuit considered a drug conviction based on the judge's improper questioning of the defendant. *Id.* at 382-83. In discussing the history and role of trial judges in England and the United States, the court stated:

> One of the reasons for allowing an English judge greater latitude to interrogate witnesses is that a British trial, so it is said, is a search for the truth. In our jurisprudence a search for the truth is only one of the trial's goals; other important values—individual freedom being a good example—are served by an attorney insisting on preserving the accused's right to remain silent or by objecting to incriminating evidence seized in violation of an accused's Fourth Amendment rights. The successful assertion of these rights does not aid—and may actually impede—the search for truth.

Id. at 384.

17. FRANK, *supra* note 5, at xiv-xv. Of course, there are many instances in which lawyers *can* predict reliably what the outcome of a particular case will be. *See* Rodney J. Uphoff, *The Criminal Defense Lawyer as Effective Negotiator: A Systematic Approach*, 2 CLINICAL L. REV. 73, 83-86 (1995)

This necessary state of flux, as well as our reliance on the adversary system, give rise to a cynicism expressed by Benjamin Franklin in the mid-seventeen hundreds, but equally reflective of the public mood today:

> I know you lawyers can with ease
> Twist words and meanings as you please;
> That language, by your skill made pliant,
> Will bend, to favor every client;
> That 'tis the fee limits the sense
> To make out either side's pretense,
> When you peruse the clearest case,
> You see it with a double face. . . .
> Hence is the Bar with fees supplied;—
> Hence eloquence takes either side. . . .
> And now we're well secured by law,
> *Till the next brother find a flaw.*[18]

This image raises perhaps the greatest fear about the role of law and lawyers: that on the same facts, and presented with the same law, two judges or juries would reach different results in the same case because of a lawyer's presentation.[19] Whether the concern is that only the wealthy can afford the best lawyers, or simply that the more "eloquent" attorney can get a better result, it is an intimidating possibility to a public that seeks certainty and justice from the law. From the vantage of a judge, however, it is not a correct or complete picture of what happens in the courtroom. (In extreme cases, of course, a lawyer (or a judge or jury) can be entirely incompetent or otherwise entirely fail to do a proper job.) To the extent judges and juries reach different results, however, much more, as Frank observed, may be attributable to the reality that judges and juries react differently to facts because their life experiences are different.[20] Working from the same facts and within the confines of the same law, however, it seems that gross disparities in result do not frequently occur.[21] But the law does evolve, and to assist its evolution and at the same

(analyzing systemic pressures to plea bargain in criminal cases). Cases that reach the trial stage do not reflect the multitude of cases resolved early—even before the complaint stage—precisely because the parties have quite a clear expectation of how their case would be decided. *See id.* at 83 (noting some defendants readily admit guilt and acknowledge responsibility for wrongs committed).

18. Benjamin Franklin, *Poor Richard's Opinion*, *in* LAW: A TREASURY OF ART AND LITERATURE 151, 151 (Sara Robbins ed., 1990).

19. *Compare* BMW v. Gore, 116 S. Ct. 1589, 1592-94 (1996) (considering constitutionality of $2 million punitive damages award for undisclosed automobile paint repairs), *with* Yates v. BMW, 642 So. 2d 937, 938 (Ala. Civ. App. 1993) (noting jury in virtually identical Alabama fraudulent car repainting lawsuit awarded no punitive damages), *cert. quashed as improvidently granted by*, 642 So. 2d 937 (Ala. 1993).

20. *See* FRANK, *supra* note 5, at xii-xiii (recognizing judge and juries bring personal prejudices to trials).

21. This conclusion is based both on personal experience as a judge and on the statistically small

time maintain their own credibility, lawyers must dispel the view that they are dishonest, dissembling, hypocritical, or that Ben Franklin's description is correctly derisive.[22]

Frank's point that the public fails to appreciate the importance of indefiniteness in the law must be addressed through better education of the public by lawyers and others, including government officials.[23] In addition, the public has other needs relating to the law: the need, for example, for lawyers to act honorably, beyond what any law, regulation, or professional rule may require. This need requires a different response.

II. MORALITY IN PUBLIC SERVICE

What are our expectations of lawyers, judges, and of public servants generally? Over the years, the response to scandal and disappointment in lawyers and in our public officials has varied. A history of ethical codes that have apparently not provided sufficient guidance to practitioners has recently led to tighter restrictions. In the public sphere, we have for some time been engaged in passing laws and regulations intended to curb unworthy behavior.[24] This may not always be adequate for public officials or for lawyers. Some would argue that reliance on regulations alone defuses the notion of personal responsibility and accountability.

Charles Dickens on a visit to the United States in the nineteenth century described his sorrow when confronted with the American approach to regulating gifts to public servants:

> The Post Office is a very compact and very beautiful building. In one of the departments, among a collection of rare and curious articles, are deposited the presents which have been made from time to time to the

number of jury verdicts set aside or new trials ordered by judges. Of course, case law principles require that appellate courts give jury verdicts a great deal of deference. *See* Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2336-38 (1994) (stating civil jury verdicts historically afforded deference on judicial review unless damages too large); United States v. Powell, 469 U.S. 57, 67 (1984) (commenting that deference to jury's collective judgment brings element of finality to criminal process); Binder v. Long Island Lighting Co., 57 F.3d 193, 201-02 (2d Cir. 1995) (finding appellate court grants "strong presumption of correctness" when reviewing whether jury verdict "seriously erroneous"); Piesco v. Koch, 12 F.3d 332, 345 (2d Cir. 1993) (requiring "seriously erroneous" verdict for grant of new trial); Dunlap-McCuller v. Riese Org., 980 F.2d 153, 158 (2d Cir. 1992) (requiring "egregious" jury verdict for new trial); Smith v. Lightning Bolt Prods., Inc., 861 F.2d 363, 370 (2d Cir. 1988) (noting no new trial unless verdict "seriously erroneous" or miscarriage of justice).

22. *See* Franklin, *supra* note 18, at 151 (expressing cynicism toward attorney's role in courtroom).

23. *See* Roberta Cooper Ramo, *Law Day More Important than Ever for Keeping Strong*, CHI. DAILY L. BULL., Apr. 27, 1996, at 8 (emphasizing importance of legal profession keeping citizenry well informed about Constitution and legal system).

24. *See infra* note 26 and accompanying text (discussing laws designed to prevent and punish public corruption); note 27 and accompanying text (describing laws and regulations applicable to public affairs); note 55 and accompanying text (outlining rule of professional responsibility prohibiting lawyer-client sexual relations).

> American ambassadors at foreign courts by the various potentates to whom they were the accredited agents of the Republic; gifts which by the law they are not permitted to retain. I confess that I looked upon this as a very painful exhibition, and one by no means flattering to the national standard of honesty and honour. That can scarcely be a high state of moral feeling which imagines a gentleman of repute and station likely to be corrupted, in the discharge of his duty, by the present of a snuff-box, or a richly-mounted sword, or an Eastern shawl; and surely the Nation who reposes confidence in her appointed servants, is likely to be better served, than she who makes them the subject of such very mean and paltry suspicions.[25]

There is indeed a national plethora of legislation at every level of government restricting activities of government officials.[26] This legislation, among other things, controls the receipt of gifts; limits the amounts of fees, and honoraria and outside employment; restricts post-employment contact with government; curbs the extent of political activities; requires the acceptance of the lowest (but not necessarily best) bids on government contracts; and sets prohibitions on the manner and ways in which to address financial and other conflicts.[27] These rules are extremely important, even vital, notwithstanding Dickens' eloquent statement to the contrary. They protect the public from many kinds of inappropriate influences on government officials, and they perform another crucial service in providing guidance to and protecting those they regulate. Public servants have sometimes walked a fine line or walked over the line between gifts and bribes.[28] If specific rules have their place, however, that does not mean that we should limit the standard we apply to public officials to the technical question of whether those rules have been broken, rather than aspiring to the highest in moral behavior. As a "Nation," we have not suffi-

25. CHARLES DICKENS, AMERICAN NOTES AND PICTURES FROM ITALY 123 (Oxford Univ. Press 1957) (1842). It is interesting that in England there is now a heightened sense that laws or rules are in fact needed to regulate the behavior of public officials. *See* COMMITTEE ON STANDARDS IN PUBLIC LIFE, FIRST REPORT, 1995, Cmnd 2850-I, at 3 (urging remedial legislative action to counter public discontent with ethical standards of public officials).

26. *See, e.g.*, 18 U.S.C. § 201 (1994) (forbidding public official from seeking or receiving bribe to influence performance of official act); 18 U.S.C. § 666 (1994) (prohibiting agent of state, local or Indian tribal government from soliciting or receiving bribe); MASS. GEN. LAWS ch. 268A, §§ 1-25 (1994) (setting forth antibribery and conflict of interest laws for state, county and municipal employees).

27. *See generally* COUNCIL ON GOVERNMENTAL ETHICS LAWS, THE COUNCIL OF STATE GOV'TS, COGEL BLUE BOOK (Joyce Bullock ed., 9th ed. 1993) (compiling information on laws governing campaign finance, ethics, lobbying and judicial conduct nationwide).

28. *See* Jane Fritsch, *The Envelope, Please: A Bribe's Not a Bribe When It's a Donation*, N.Y. TIMES, Jan. 28, 1996, at D1 (revealing subtle distinction between illegal bribes and legal campaign contributions to politicians); Stephen Kurkjian, *Ferber's Conviction Spurs Widening of Probe*, BOSTON GLOBE, Aug. 15, 1996, at B5 (reporting planned investigation of Massachusetts politicians after corruption conviction of former financial advisor to state agencies).

ciently emphasized the importance of professional morality in public service, whether among our government officials or our lawyers. Instead, we overemphasize social morality, concentrating on personal scandals that we cannot regulate, then pass detailed rules, hoping to elevate professional behavior in that way. If we limit our expectations to what is specifically regulated (and sometimes over-regulated), we may in effect degrade the offices and the people who hold them.

In other countries, public morality is approached differently. In Europe, for example, public officials often have greater discretion, are better paid, and are held to higher standards of behavior, in some instances resigning their office if there is the hint of financial scandal in their work.[29]

The tolerance in this country for questionable behavior by public officials is illustrated by the persistence of extremely troubling—but legal—practices in the public arena. In one of the murkiest and least well-controlled areas, we find ourselves debating what the quid pro quo's are for campaign contributions. Here we have abandoned standards we would surely apply in any other context. We would never condone private gifts to judges about to decide a case implicating the gift-givers' interests.[30] Yet our system of election financing permits extensive private, including corporate, financing of candidates' campaigns, raising again and again the question what the difference is between contributions and bribes and how legislators or other officials can operate objectively on behalf of the electorate.[31] Can elected officials say with credibility that they are carrying out the mandate of a "democratic" society, representing only the general public good, when private money plays such a large role in their campaigns? If they cannot, the public must demand a change in the role of private money or find other ways, such as through strict, well-enforced regulation, to ensure that politicians are not inappropriately influenced in their legislative or executive decision-making by the interests that give them contributions.[32] As Congress revamps many questionable practices, including the receipt of gifts from lobbyists, it must monitor to the public's satisfaction both whether inappropriate activity is being left un-

29. *See generally* Mark Davies, *The Public Administrative Law Context of Ethics Requirements for West German and American Public Officials: A Comparative Analysis*, 18 GA. J. INT'L & COMP. L. 319 (1988) (detailing differences between ethics regulations for American and German public officials).

30. *Cf.* Scott D. Wiener, Note, *Popular Justice: State Judicial Elections and Procedural Due Process*, 31 HARV. C.R.-C.L. L. REV. 187, 194 (1996) (discussing Texas attorney Joe Jemail's $10,000 campaign contribution to judge in Texaco-Pennzoil case).

31. *See* Fritsch, *supra* note 28, at D1 (reporting influence of special interest money as serious political issue).

32. *See* Jamin Raskin & John Bonifaz, *The Constitutional Imperative and Practical Superiority of Democratically Financed Elections*, 94 COLUM. L. REV. 1160, 1160 (1994) (proposing replacement of federal election finance system with total public financing of congressional campaigns).

regulated and whether laws and regulations that are put in place are actually enforced. The continued failure to do this has greatly damaged public trust in officials and exacerbated the public's sense that no higher morality is in place by which public officials measure their conduct.

Similarly, the public wonders whether lawyers have enforceable rules of self-government or any kind of defined morality. Professional codes tend to speak in terms of ethical presumptions, without prescribing what lawyers should do in specific, troubling situations. For example, almost all professional codes require that a lawyer should represent a client zealously within the bounds of the law and may not suborn perjury or the creation of false documents.[33] But no rule guides a lawyer who is merely left with a firm and abiding conviction that what is being said or proffered by a witness or client is false. Rules might be ill-suited to answer such dilemmas, but moral imperatives, or what Lord Moulton described in 1924 as "Obedience to the Unenforceable," may be more helpful.[34]

Lord Moulton, to be sure a man of his time, spoke of Obedience to the Unenforceable as a standard that people live up to despite the fact that no law can force them to do so.[35] He gave as an example the conduct of the men aboard the Titanic who, facing imminent death, nevertheless adhered to the principle that women and children should be saved first:

> Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners. . . . The feeling of obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved.[36]

Our public officials and lawyers should also be prepared to adopt a culture that depends upon subjective accountability as well as well-defined, consistent rules and regulations:

> The difference between the true lawyer and those men who consider the law merely a trade is that the latter seek to find ways to permit their clients to violate the moral standards of society without overstepping the letter of the law, while the former look for principles which will persuade their clients to keep within the limits of the spirit of the law in common moral standards.[37]

33. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1995) (noting candor toward tribunal prevents lawyer from offering false evidence); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-1, 7-6 (1983) (declaring lawyer's duties to client and legal system).

34. Lord Moulton, *Law and Manners*, ATLANTIC MONTHLY, July 1924, at 1, 1. Lord Moulton, a judge and member of the British Parliament, served as Minister of Munitions for Great Britain at the outbreak of World War I. *Id.*

35. *Id.*

36. *Id.* at 4.

37. PIERO CALAMANDREI, EULOGY OF JUDGES 45 (John Clarke Adams & C. Abbott Phillips, Jr.

III. THE BAR'S RESPONSIBILITY

What is the responsibility of a practicing lawyer, and how could lawyers' behavior be changed in ways to encourage greater respect for the legal profession? To take one example of a tolerated but unacceptable pattern, let us examine the lying and misrepresentation that occurs in court.

Lawyers are not routinely confronted with the clear-cut dilemma that a client proposes to "lie" on the stand. A client presents a version of the facts, and lawyers rarely have independent, first-hand knowledge of them. (In criminal cases, clients frequently choose not to take the stand, often on the advice of an attorney, advice that is given for any number of reasons, including the risk of presenting perjured testimony.) Some number of these witnesses lie, including some for the prosecution and some for the defense, and their lawyers suspect as much. What more commonly occurs is that witnesses, often unconsciously, allow selectivity, prejudice, and emotion to color their perceptions. Even when two witnesses directly contradict one another, both may be "telling the truth" from their own point of view or to the best of their recollection. Real life is complex, and we have chosen to use the adversarial system to sort out the truth as best it can.[38]

To maintain credibility in the system, however, we must study how well we do in fact get at the "truth." Lying is risky in the courtroom, but not generally because of the threat of a perjury indictment. It is risky because each side has the opportunity, through discovery, independent investigation, and cross-examination, to expose falsehood.[39] But the adversarial system may not always be wholly adequate to the task of exposing wrong-doing and false or inflated claims. Empirical studies have been performed, for example, that examine the reliability of witnesses and jurors.[40] Many factors influence witnesses and juries, including subconscious racism and other prejudices. As a profession, we should seek, based

trans., 1942).

38. *See* SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE 158-59 (1978) (analyzing how adversary system sometimes encourages attorneys to argue credibility of knowingly perjurious clients).

39. *See* FED. R. CIV. P. 26-37 (setting forth rules governing depositions and discovery in federal civil cases); FED. R. CRIM. P. 16 (establishing rules of evidentiary disclosure by both government and defendant in criminal cases); FED. R. EVID. 607 (allowing impeachment of witness' credibility).

40. *See generally* JEFFREY T. FREDERICK, THE PSYCHOLOGY OF THE AMERICAN JURY (1987) (presenting social scientific research on jury behavior and persuasion); SAUL M. KASSIN & LAWRENCE S. WRIGHTSMAN, THE AMERICAN JURY ON TRIAL: PSYCHOLOGICAL PERSPECTIVES (1988) (analyzing jury reliability and phases of jury trial); Christopher M. Walters, Note, *Admission of Expert Testimony on Eyewitness Identification*, 73 CAL. L. REV. 1402 (1985) (discussing expert witness reliability in eyewitness identification cases).

upon empirical evidence, ways in which to improve our ability to arrive at the truth. If we undertake this seriously, we will not only do well by the cause of justice, but we will justifiably improve the public's opinion of our profession.

The adversary system may also be ill-suited to resolve certain types of disputes such as those presented by "battles of the experts" in medical malpractice and many other kinds of cases. There is recurring debate about the ability of jurors to evaluate such evidence. The Supreme Court of the United States, in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*,[41] has reacted to this debate by expanding the judge's function to require that scientific testimony be evaluated more stringently before it can be presented to the jury.[42] Certainly, the battle of the experts undermines public confidence not only in the certainty of the law, but in another desired bedrock, the certainty of science. We must revisit whether other methods of inquiry into specialized areas—such as the use of court-appointed experts or Special Masters who share their conclusions with juries—may be more useful to resolve these kinds of disputes. The current system, in this particular respect, should somehow be made to work better or should be critically evaluated, and if necessary, replaced.

Finally, the adversary system, almost by definition, cannot address the gray area of the "truth" present in most cases because the system tends to produce all-or-nothing winners and losers. This is why settlements and new forms of "alternative dispute resolution" are so important.[43] Dickens' remark that honorable lawyers admonish their clients to "[s]uffer any wrong that can be done you, rather than come here [to the courts]," is still timely for many litigants.[44] The adversary system has its limitations under the best of circumstances, and so we must explain why the benefits of the system outweigh those limitations. If, as has been said of democracy, the adversary system is "the worst form of Government except [for] all those other forms," then that is the way in which the public should understand it: not as a system expected to accomplish more than any system can.[45]

As we ponder how effective our legal system is, we must help create

41. 509 U.S. 579 (1993).

42. *See id.* at 597 (acknowledging Federal Rules of Evidence require judge to ensure scientifically valid principles support expert testimony).

43. *See* Abraham Lincoln, Notes for a Law Lecture, *in* THE OXFORD DICTIONARY OF AMERICAN LEGAL QUOTATIONS 302 (Fred R. Shapiro ed., 1993) ("As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."); Joshua A. Darrell, *For Many, Litigation Retains Important Practical Benefits*, NAT'L L. J., Apr. 11, 1994, at C11 (discussing benefits of alternative dispute resolution).

44. CHARLES DICKENS, BLEAK HOUSE 51 (Norman Page ed., Penguin Books 1971) (1853) (quotation marks omitted).

45. Winston Churchill, Speech (Nov. 11, 1947), *in* THE OXFORD DICTIONARY OF QUOTATIONS 202 (Angela Partington ed., 4th ed. 1992).

greater credibility in existing, useful mechanisms. A number of years ago, Judge Harold Rothwax of the Supreme Court of the State of New York noted his concern that illegal activities occur in the judicial system sometimes for years and that lawyers do not report them.[46] In a heartening exception to this generalization, insurance kick-backs were recently exposed by a lawyer who was offered one in New York.[47] Similarly, we recently have heard much about the police practice of tailoring testimony to avoid the suppression of evidence, an apparently common practice that must be known to, or at least suspected by, some prosecuting attorneys.[48] Often, however, lawyers, instead of engaging in genuinely useful projects to ferret out fraud, tend to denigrate either the law itself or the role and quality of work performed by lawyers in the fields, for example, of personal injury or criminal defense.

The response that can give the public confidence in our profession is our own leadership in weeding out the fraudulent and wrongful conduct that the public rightly condemns at the same time as we challenge overreactions that undermine the principles of our judicial system.[49] Lawyers have unfortunately joined the public outcry over excessive verdicts and seemingly ridiculous results reached in some cases.[50] Legislators have introduced bills that place arbitrary limits on jury verdicts in personal injury cases.[51] But to do this is inconsistent with the premise of the jury system. The focus must be shifted back to monitoring frivolous claims, uncovering pervasive misrepresentation in court, and educating the public that no system of justice is perfect. Despite occasional disappointing re-

46. *See Symposium: Ethics in Government*, CITY ALMANAC, Winter 1987, at 20, 20 (noting corruption in legal system succeeds when a few good people do nothing).

47. *See* Matthew Goldstein, *23 Lawyers Arrested in Insurance Scheme: Inflating of Settlements in Tort Cases Charged*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting praise of whistleblowing attorney who stated he "did what any honest citizen would do"); George James, *47 Accused in an Insurance Claim Scheme*, N.Y. TIMES, Sept. 22, 1995, at B3 (describing district attorney's praising lawyer as "credit to the legal profession and the general public").

48. *See* HAROLD J. ROTHWAX, GUILTY: THE COLLAPSE OF CRIMINAL JUSTICE 63-65 (1996) (discussing problems exclusionary rule creates for law enforcement officers); *see also And What About Justice?*, WALL. ST. J., Sept. 1, 1995, at A6 (discussing perjury by law enforcement officers in O.J. Simpson trial and on Philadelphia police force).

49. *Cf. supra* note 47 and accompanying text (describing efforts of New York attorney exposing fraudulent practices by plaintiff's personal injury attorneys).

50. *See Was Justice Served?*, WALL ST. J., Oct. 4, 1995, at A14 (publishing attorney's criticism of criminal trials as "indistinguishable from Roman circuses" and civil justice system as "equally demented").

51. *See* Common Sense Product Liability Legal Reform Act of 1996, H.R. 481, 104th Cong. (limiting punitive damages in certain cases); Richard B. Schmitt, *As Clinton Vows to Veto Products-Liability Bill, Some Ask if He's Too Beholden to Trial Lawyers*, WALL. ST. J., Mar. 22, 1996, at A14 (discussing political opposition to tort reform legislation limiting manufacturers' liability in suits over defective products); Glenn R. Simpson, *Trial Lawyers, After Flirting With GOP in 1995, Are Sitting at Democratic Party's Table Again*, WALL. ST. J., July 16, 1996, at A12 (reporting presidential veto of congressional legislation limiting product liability damages).

sults, our system does have mechanisms in place that moderate jury verdicts (such as judges' discretion to set aside or reduce unreasonable verdicts), that allow for the discipline of lawyers, and that can result in punishment of perjurers.[52]

Criminal law is the most challenging arena in which to satisfy the public that our system adequately addresses problems of apparently wrong verdicts. This is largely because the public either does not understand or does not accept the necessity for safeguards against overzealous prosecution and the protection of certain civil liberties. The role of criminal defense lawyers in particular is not well understood or sufficiently appreciated by many lawyers, much less the public. Prosecutors and government officials should be especially sensitive to and publicly supportive of the fundamental place constitutional safeguards and the defense bar have in our system. We must take an aggressive role in cleaning our own house by educating ourselves and publicly supporting our colleagues who perform essential functions in asserting and protecting the constitutional rights ~~of defendants~~.[53]

If we can persuade the public that the system we have in place and the roles played by lawyers within that system are the best available, there remain ancillary issues of an ethical nature that do not necessarily involve what happens in the courtroom. We have an obligation, for example, to address professional conduct perceived by the public to be wrong even if it is not necessarily illegal. For example, in New York State, a recent study of the matrimonial bar concluded that a very significant negative sense exists of matrimonial practice, based on the perception that matrimonial lawyers often take unfair financial advantage of emotionally fragile clients.[54] Similarly, California found that sexual exploitation of clients

52. *See* Gasperini v. Center for Humanities, Inc., 116 S. Ct. 2211, 2214 (1996) (applying New York check on excessive damages to federal court); Bender v. City of New York, 78 F.3d 787, 794-95 (2d Cir. 1996) (finding verdict of $300,700 excessive in civil rights action); Scala v. Moore McCormack Lines, Inc., 985 F.2d 680, 684 (2d Cir. 1993) (finding $1.5 million verdict for pain and suffering excessive); *see also* 18 U.S.C. §§ 401-02 (granting courts power to punish contempt of courts' authority, including obstruction of justice); FED. R. CIV. P. 11(c) (providing for sanctions of lawyers who pursue frivolous claims and needless litigation); FED. R. CIV. P. 59 (empowering judges to grant new trials and amend judgments in nonjury trials).

53. *See* Miranda v. Arizona, 384 U.S. 436, 480 (1966) (noting attorney carries out sworn duty by advising client to remain silent during police questioning). The *Miranda* Court emphasized that an attorney's advice of silence in the face of criminal investigation is an exercise of "good professional judgment," not a reason "for considering the attorney a menace to law enforcement." *Id.*; *see also* United States v. Filani, 74 F.3d 378, 384 (2d Cir. 1996) (noting that "fulfilling professional responsibilities 'of necessity may become an obstacle to truthfinding.'") (quoting *Miranda*, 384 U.S. at 514 (Harlan, J., dissenting)).

54. *See* COMMITTEE TO EXAMINE LAWYER CONDUCT IN MATRIMONIAL ACTIONS, ADMINISTRATIVE BD. OF THE COURTS OF N.Y., REPORT 1-5 (1993) (identifying criticism of divorce law system and proposing reforms and improvements for lawyers and courts); *see also Carpe Diem*, N.Y. L.J., Mar. 12, 1993, at 2 (citing report critical of divorce lawyers by New York City Department of Con-

was a pervasive enough problem in divorce and other areas of legal practice that the California Supreme Court passed a very hotly debated professional rule setting forth a lawyer's professional obligations in these situations.[55]

Whether the rule will have an effect in California on the public's perception of lawyers depends largely on how vigilantly their colleagues and others hold lawyers to the rule: Will lawyers actually be reported to the bar association when they are suspected of having inappropriate sexual relations with a client? How aggressively will they be investigated? And will they be held accountable if they continue to represent a client with whom they are having an impermissible sexual relationship?

Failure to enforce such a rule will again feed the public's mistrust, which arises in part from the sense that lawyers (and public officials), whose conduct is generally self-policed, protect themselves from proper regulation. In New York, for example, disciplinary proceedings have until recently been closed to protect lawyers from unjust criticism and harm to their reputations. Despite a recommendation by its Task Force on the Profession that these proceedings be made public, the House of Delegates of the New York State Bar Association is opposing the measure.[56] Unquestionably, unjust criticism of a professional can be devastating. But it is worth examining whether that concern is better addressed by creating a quick, fair process for determining whether a charge is unfounded than by continuing a practice of not airing complaints publicly.[57] Alternatively, we must find other ways to assure the public that closed proceedings are effective in disciplining lawyers, and we must do more to monitor them. One way or another, there must be convincing public justification for the manner in which discipline and performance is regulated.

In the political sphere, the sense that elected officials fail to police themselves is equally prevalent. Partisanship is the accepted "adversarial" mechanism that is supposed to maintain checks and balances and protect the public in various contexts, including in the fields of elections and campaign finance.[58] Bipartisan commissions, such as boards of elections

sumer Affairs commissioner).

55. CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-120 (1995).

56. *See* Gary Spencer, *State Bar Opposes Any Public Discipline Procedures*, N.Y. L.J., June 27, 1995, at 1 (reporting bar association refused to endorse "even the smallest step toward opening" disciplinary process to public). The Association of the Bar of the City of New York has endorsed opening up these proceedings. *See* Committee on Professional Discipline, *The Confidentiality of Disciplinary Proceedings*, 47 REC. ASS'N B. CITY N.Y. 48, 60 (1992) (advocating opening process to public after determination that proceedings should begin).

57. Arguably, lawyers do not exhibit the same heightened sensitivity to the plight their clients suffer when unfair or embarrassing information becomes public through legal proceedings.

58. The Federal Election Commission is, for example, bipartisan by law. *See* 2 U.S.C. § 437c(a)(1) (1994) (providing that only three of six members appointed to Commission "may be affili-

or most campaign finance agencies, often reflect a close relationship between commissioners and party politics.[59] The result is often votes on individual matters along party lines rather than on the merits, and policies and procedures that favor the established parties over independent or alternative groups.[60] By contrast, the experience of New York City's Campaign Finance Board—a pioneer agency regulating New York City's program of optional public financing of political campaigns—has been that of a deliberative, non-partisan board that nearly always acts unanimously and certainly always without regard to party affiliation. The non-partisan culture of that board is a model for decision-making in the political sphere. But few legislators—including the federal Congress—are prepared to have their campaign finances monitored by a genuinely non-partisan, objective body. As a result, there are areas of activity—including campaign finance—regulation of which is vital to the health of our democracy. Yet bipartisan agencies with weak claim to the public's trust largely administer that regulation. The legislators' failure to submit themselves to meaningful scrutiny heightens cynicism about our elected officials, many of whom, as we all know, are lawyers.

In short, we must find ways to re-evaluate and, if necessary, alter our methods of concluding legal and political conflicts. Next, we must find effective, confidence-building mechanisms for policing ourselves. Further, we must be prepared to entrust judgments on our own professional fitness not only to our colleagues, but to the public.

IV. THE RESPONSIBILITY OF OTHERS

The changing nature of the law and the conduct of lawyers give the public understandable pause. We must not, however, fall prey to the public's cynicism. We must instead expect more of our profession. There is a limit to how far an individual lawyer can elevate the bar as a whole. What a lawyer can do, as argued above, is educate the public—at the very least in the person of his or her clients—and personally raise standards by living up to a code of conduct beyond what is "enforceable." This responsibility is not confined to attorneys in private practice. The others who operate in or around the legal framework—judges, prosecutors, juries, witnesses, public officials, and the press—must also educate themselves, and others, and apply higher standards of conduct to their own behavior.

ated with the same political party").

59. *See* Jan Hoffman, *Pataki Names Close Adviser to Judicial Screening Panel*, N.Y. TIMES, Sept. 14, 1996, at 25 (reporting bar associations' criticism of governor's appointing closest legal adviser to commission on judicial nominations).

60. *See id.* (reporting criticism that appointee would serve as stand-in for governor on commission recommending candidates to state's highest court).

Much distrust arises from a lack of understanding, whether about the purpose and role of the adversary system, the presumption of innocence, the right of every party to be represented by an attorney, or the facts and proceedings of a specific case—even a case as highly publicized as the O.J. Simpson trial. The limitations of the law are also poorly understood. We need the help of the schools, our media, and our public officials to communicate the values and limitations of our system of justice and to free us from simplistic analysis that breeds contempt.

What we should also acknowledge, to broaden the true reach of the law's majesty, is the role that many influences, including the press and the lay public, play in contributing to our intricate legal system.

What we propose is as follows:

> *First*, lawyers must make a greater effort at educating themselves, their clients, and the public about the key underpinnings of our legal system: the reasons for the law's uncertainty; the values and limitations of the adversary system; and the importance of respecting every kind of legal practice and the role it plays in helping our society to achieve its goals and progress.
>
> *Second*, we must re-examine what does and does not work to bring about justice and consider whether we can improve aspects of our system. Is the adversary process the best way of determining whether witnesses are telling the truth or for dealing with the "battle of the experts"? If not, let us improve what we have, or find a better way, recognizing that we cannot achieve perfection.
>
> *Third*, we must instill among ourselves and our public officials a culture of a high morality, as best we can. We must determine what ethical guidelines are appropriate and then enforce them seriously. We must adopt concrete ways to recognize those among us who practice law at the highest moral levels. We must combine to act more honorably both within our own sphere and collectively as a profession, supporting each other in the inevitable controversies that arise when lawyers properly carry out responsibilities that are ill-understood by the public.
>
> *Finally*, we must enlist not only every group of our profession, including judges, lawyers, legislators, and other public officials, to adhere to higher standards. We must also enlist clients, jurors, journalists, and all our fellow citizens, because we are all touched by the law, and we can all have an influence on how it evolves.[61]

61. Judges generally receive criticism if they ask, or let juries ask, too many questions to witnesses. *See* United States v. Filani, 74 F.3d 378, 384 (2d Cir. 1996) (commenting on popular notion that limited questioning by trial judge guards against bias); United States v. Ajmal, 67 F.3d 12, 14-15 (2d Cir. 1995) (discussing dangers of prejudice and compromise of juror neutrality in juror questioning of witnesses); *see also* Bill Alden, *Juror Inquiries Require Retrial for Defendant*, N.Y. L.J., Sept. 22, 1995, at 1 (reporting how improper juror questioning in *Ajmal* case led to reversal and new trial). In today's media-dominated world, jurors are more informed about legal issues than ever before. More explanation by judges why certain legal principles are important or why certain evidentiary rulings

We cannot delay in addressing these moral issues of professional conduct. We are faced with on-going instances of erosion in public confidence. The O.J. Simpson trial and the constantly recurring investigations of public officials continue to subject our profession and government officials to public scorn and ridicule. The response, if we do not act, will be an increasing amount of legislation criminalizing and otherwise regulating conduct and a demoralization in the practice of law and public service. We are losing many fine elected officials to retirement who no longer care to operate in a bitterly partisan and hostile atmosphere governed by few meaningful rules of conduct and subject to heightened and unrelenting personal scrutiny by the press. Among our own ranks, senior practitioners complain bitterly of the loss even of professional courtesy among lawyers and office holders.

In Boston, lawyers call their adversaries "brother" or "sister" in court. Anyone who experiences the practice appreciates the grace it adds to the proceedings. This grace is created by the aura of respect the titles seek to convey. In light of the increasing call by lawyers to return to greater professional civility, it is clear we ourselves feel and regret the loss of professional courtesy and respect.[62] We must first give respect to each other and to the profession—in word and in deed—before we can expect the public to do so.

If we act in these areas, the public discourse, the behavior of our lawyers and public officials as well as their reputations, and, ultimately, confidence in our legal system as a whole will be greatly enhanced.

have been made may be helpful to contain speculation that can lead juries astray. Similarly, if jurors ask questions that seek to clarify evidence, and if the practice is properly controlled, this may preserve rather than interfere with a jury's impartiality.

62. *See* Louis P. DiLorenzo, *Civility and Professionalism*, N.Y. ST. B.J., Jan. 1996, at 8, 8-10, 25 (exploring scope of decline in professionalism among attorneys, uncovering its cause and suggesting possible solutions); *see generally* NEW YORK STATE BAR ASS'N, CIVILITY IN LITIGATION: A VOLUNTARY COMMITMENT (1995) (explaining suggested guidelines for behavior of all participants in litigation process).

SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART ONE, QUESTION 15

Attached are copies of all unpublished opinions referenced in Question 15.

Ulf W. RUNQUIST, as trustee of Runquist and Co., Inc., Profit Sharing Trust.
Plaintiff,
v.
DELTA CAPITAL MANAGEMENT, L.P., John M. Lefrere and William H. Gregory.
Defendants

No. 91 Civ. 3335 (SS).

United States District Court, S.D. New York.

Feb. 18, 1994.

OPINION AND ORDER

SOTOMAYOR, District Judge.

*1 Pursuant to Fed.R.Civ.P. 60(b), plaintiff Ulf W. Runquist moves to reconsider my Order dated July 15, 1993 adopting the Second Supplemental Report and Recommendation of Magistrate Judge Barbara E. Lee. Magistrate Judge Lee recommended dismissing plaintiff's federal fraud claim pursuant to Fed.R.Civ.P. 56(c), and dismissing plaintiff's common law claims pursuant to Fed.R.Civ.P. 41(b) for failure to prosecute. For the reasons set forth below, the motion for reconsideration is denied.

BACKGROUND

The facts of this case are set forth in detail in my Order dated July 15, 1993 (the "Order") adopting the Second Supplemental Report and Recommendation of Magistrate Judge Barbara E. Lee. Although I assume familiarity with the Order, I briefly summarize the relevant procedural history of this case.

Plaintiff Runquist purchased a limited partnership interest in Delta Capital Management ("Delta") allegedly in reliance upon false statements made by Delta's general partners, pro se defendants John LeFrere and William Gregory. On December 3, 1991, LeFrere moved for summary judgment on the ground that plaintiff could not prove reliance, a necessary element for a fraud claim under federal law.

The action was referred to Magistrate Judge Barbara E. Lee on December 13, 1991 by Judge Kimba M. Wood. On February 20, 1992, Magistrate Judge Lee established April 6, 1992 as the deadline for plaintiff's submission of papers in opposition to the summary judgment motion. Plaintiff filed no papers by that deadline. On August 17, 1992, Magistrate Judge Lee issued her first Report and Recommendation (the "Report"). The Report concluded that plaintiff: (1) had completely failed to demonstrate reliance, an essential element of its case; (2) had not arrived at a scheduled Status Conference; (3) had not served defendant Gregory in a timely manner, despite repeated instructions by Judge Wood; (4) had failed to engage in discovery within the time frame established by Judge Wood; and (5) had made no timely effort to oppose plaintiff's summary judgment motion. On the record, Magistrate Judge Lee recommended dismissing the fraud claim against LeFrere for failure to demonstrate reliance, and dismissing the outstanding common law claims against LeFrere for failure to prosecute.

On August 28, 1992, plaintiff objected to the Report and moved for reconsideration. Plaintiff's counsel, Louis S. Sandler, alleged that he drafted an affidavit in opposition to the summary judgment motion in December 1991. Sandler claims he discussed the affidavit with plaintiff on January 2-3, 1992. However, no affidavit was ever filed with the Clerk of the Court. Sandler blames this omission on a disgruntled secretary who left his firm's employment in January 1992. Sandler attached what purported to be a copy of the lost affidavit to the motion for reconsideration. The copy was not signed, but Sandler represented that the affidavit would be re-executed upon plaintiff's return from Sweden on August 29, 1992. Affidavit of Lewis S. Sandler, sworn to August 28, 1992, ¶ 4.

*2 On September 24, 1992, Magistrate Judge Lee considered an affidavit executed by plaintiff on September 14, 1992. The September 14 affidavit differs substantially from the draft affidavit attached to plaintiff's August 28, 1992 motion for reconsideration. Magistrate Judge Lee issued a Supplemental Report and Recommendation, which concluded that the new affidavit failed to establish a genuine dispute over a material issue of fact. Supplemental Report at 3. It also found that plaintiff's "lame excuses" for continued delay were insufficient to warrant modification of the prior recommendation to dismiss the common law claims

for failure to prosecute. Id. at 5.

Plaintiff renewed its objections and filed another motion for reconsideration. The motion contained yet another affidavit, this time identical to the draft attached to the August 28 motion. Apparently this affidavit was sent to Judge Wood's Chambers on or about August 31, 1992. This affidavit was not filed with the Clerk of the Court, and was not part of the record considered by the Magistrate Judge. Curiously, this affidavit was executed in New York on August 28, 1992. According to Sandler in his August 28 motion and affidavit, his client was in Sweden until August 29.

On November 17, 1992, Magistrate Judge Lee issued a Second Supplemental Report and Recommendation. After considering the latest affidavit, she determined again that it failed to establish material issues of fact sufficient to pierce the pleadings. Magistrate Judge Lee also adhered to her recommendation to dismiss the remaining claims for failure to prosecute pursuant to Fed.R.Civ.P. 41(b).

I issued an Order on July 15, 1993 (the "Order") adopting Magistrate Judge Lee's Second Supplemental Report and Recommendation. The Order concluded that reliance had not been proven, and that summary judgment of the federal fraud claim was appropriate. The Order also found that:

> [A] plaintiff who, inter alia, repeatedly fails to serve one defendant after being so instructed by the Court, fails to serve another altogether, fails to arrive at a scheduled Status Conference, fails to engage in discovery, fails to oppose a motion for summary judgment, and engages in a pattern of suspicious, dilatory tactics with regard to the production of affidavits, has evidenced, at a minimum, a failure to prosecute warranting dismissal with prejudice pursuant to Fed.R.Civ.P. 41(b).

Order at 11-12 (footnote omitted). The Order dismissed the complaint with prejudice. Id. at 13.

Plaintiff brings this motion for reconsideration of my Order. In the motion, plaintiff states that it opposed the summary judgment motion in a timely manner. As evidence of this proposition, plaintiff offers two forms of proof. First, plaintiff attaches a copy of a receipt from a notary public, who notarized a document for Runquist on January 2, 1992. Plaintiff alleges that that notarized document was the original affidavit in opposition to the defendant's motion for summary judgment.

*3 Second, plaintiff attaches a letter it sent to defendant LeFrere. The letter is dated January 14, 1991, [FN1] and advises LeFrere that attached is a copy of "the affidavit of Ulf W. Runquist in opposition your Motion for Summary Judgment." Pl.Ex. B. At the bottom of the letter appears a handwritten endorsement by LeFrere that reads:

> Lew,
> I will be sending a retort to Bill Runquist's affidavit against my motion for Summary Judgment in the next several days. I will send you a copy of such the same day it is mailed to the court.
> Sincerely,
> John M. LeFrere

Plaintiff maintains that this note demonstrates that LeFrere misled the Court into believing that he never received the affidavit. Plaintiff points out that LeFrere's most recent papers are now unsworn.

Plaintiff concedes that it "cannot explain" what happened to the original affidavit prepared in December 1991. Affidavit of Lewis S. Sandler, executed July 30, 1993 (hereinafter "Sandler Aff."), ¶ 2. However, plaintiff argues that because the affidavit was "promptly re-executed," the loss of the affidavit was not a sufficient basis for granting summary judgment or dismissing the remaining claims. Sandler Aff. ¶ 12. Plaintiff also denies that there was anything surreptitious about the re-execution of the original affidavit. Sandler claims that the document is simply misdated August 28 instead of August 31. In Sandler's words, "[i]t was a classic slip." Sandler Aff. ¶ 7. To support this claim, Sandler submitted a photocopy of Runquist's passport, which bears a stamp indicating that plaintiff returned to the United States on August 29, 1992.

Plaintiff also maintains it was "not at fault for not pressing discovery." Sandler Aff. at 3. Plaintiff argues that it believed discovery had been stayed until resolution of the summary judgment motion. Plaintiff supports this claim with a letter from LeFrere to Judge Wood's Chambers in which he states that the upcoming pretrial conference and trial date are "stayed indefinitely until resolution on my Motion for Summary Judgment." Pl.Ex. C.

Plaintiff also states that engaging in discovery would have been futile, "[a]s co-defendant Gregory had not been served, and therefore, any depositions in his absence would have been a nullity as to him and would have had to be repeated." Sandler Aff. ¶ 6.

DISCUSSION

Rule 60(b), F.R.Civ.P., provides in pertinent part:

> On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence ...; (3) fraud ... misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied ...; or (6) any other reason justifying relief from the operation of the judgment.

Rule 60(b) strikes a balance between "serving the ends of justice and preserving the finality of judgments." Neimaizer v. Baker, 793 F.2d 58, 61 (2d Cir.1986) (citing House v. Secretary of Health and Human Services, 688 F.2d 7, 9 (2d Cir.1982); Seven Elves, Inc. v. Eskenazi, 635 F.2d 396, 401 (5th Cir.1981)). The district court's responsibility is to "maintain a balance between clearing its calendar and affording litigants a reasonable chance to be heard." Enron Oil Corp. v. Diakuhara, Bulk Oil (U.S.A.), Inc., 10 F.3d 90, 95 (2d Cir.1993) (citations omitted). The Rule should be construed broadly to do substantial justice, while keeping in mind that final judgments should not be lightly reopened. Neimaizer at 61 (quotation omitted). Because 60(b) motions seek extraordinary judicial relief, they should be granted only on a showing of exceptional circumstances. Mendell v. Gollust, 909 F.2d 724, 731 (2d Cir.1990), aff'd, 501 U.S. 115, 111 S.Ct. 2173 (1991) (citations omitted). See also Bicicletas Windsor, S.A. v. Bicycle Corp. of America, 783 F.Supp. 781, 787 (S.D.N.Y.1992) (60(b) motions "not granted lightly") (citations omitted).

*4 The decision to grant 60(b) relief lies within the discretion of the district court. Maduakolam v. Columbia Univ., 866 F.2d 53, 55 (2d Cir.1989). In cases where the party seeking 60(b) relief has not been heard on the merits, all doubts should be resolved in favor of that party. Salomon v. 1498 Third Realty Corp., 148 F.R.D. 127, 128 (S.D.N.Y.1993) (citing Sony Corp. v. S.W.I. Trading, Inc., 104 F.R.D. 535, 539-49 (S.D.N.Y.1985)).

Plaintiff has not specified which subsection of 60(b) underlies its motion. Rule 60(b) motions seeking to undue the mistakes or omissions of counsel could, on the face of the statute, be considered under 60(b)(1) or 60(b)(6). Rule 60(b)(6) may be used to rectify mistakes or omissions by counsel that are the result of "extraordinary circumstances." PT Busana Idaman Murani v. Marissa by GHR Industries Trading Corp., 151 F.R.D. 32, 34 (S.D.N.Y.1993) (citing United States v. Cirami, 563 F.2d 26, 34-35 (2d Cir.1977) ("Cirami II") (other citations omitted)). See also United States v. Cirami, 535 F.2d 736, 741 (2d Cir.1976) ("Cirami I") (even gross negligence by attorney does not justify use of 60(b)(6)). Plaintiff, however, does not allege any extraordinary circumstances that would justify considering the mistakes and omissions of counsel under Rule 60(b)(6). Attorney Sandler even characterizes one of his mistakes as a "classic slip." Sandler Aff. ¶ 7.

Under Rule 60(b)(1), however, the Second Circuit has "consistently declined" to alter judgments in cases where the mistake or omission was the result of counsel's "ignorance of the law or other rules of the court, or his inability to efficiently manage his caseload." Neimaizer at 62 (quoting Cirami I at 739 (other citations omitted)). Furthermore, 60(b)(1) relief will not be granted to remedy the consequences of a poor litigation strategy. Id. (citing Chick Kam Choo v. Exxon Corp., 699 F.2d 693, 695 (5th Cir.), cert. denied sub nom., Chick Kam Choo v. Esso Oil Corp., 464 U.S. 826 (1983)). See also Spray Tech Corp. v. Wolf, 113 F.R.D. 50, 51 (S.D.N.Y.1986) (same).

Speaking in the context of vacating default judgments, the Second Circuit has provided additional guidance. District courts should not grant a 60(b) motion made by an "essentially unresponsive party" whose actions have halted the adversary process. Maduakolam at 55 (citing Sony at 540). In cases where the unresponsive party seeks 60(b) relief, denial of the motion is justified as a means to protect the other party from "interminable delay and continued uncertainty as to his rights." Id.

In cases where counsel's mistake or omission falls within one the previously enumerated examples of an inexcusable mistake or omission, clients cannot seek 60(b) relief. Neimaizer at 63. This principle is based on the theory that a person who selects counsel cannot avoid the consequences of the agent's acts or omissions. Id. at 62 (citing Link v. Wabash Railroad Co., 370 U.S. 626, 633-34 (1962) (other citations omitted)).

*5 Guided by these principles, I turn to plaintiff's motion. I start by noting that plaintiff's numerous arguments concerning the affidavit in opposition to the summary judgment motion miss an important point. The summary judgment motion was not granted because no affidavits were ever filed. The fraud claim was carefully evaluated by both Magistrate Judge Lee and myself prior to dismissal.

Magistrate Judge Lee generously considered the substance of each submitted affidavit, despite their irregularities. In her Supplemental Report and Recommendation of September 24, 1992, Magistrate Judge Lee concluded that the affidavit executed on September 14, 1992, failed to establish a genuine issue of material fact. Supplemental Report at 3. The affidavit misdated August 28 was considered by Magistrate Judge Lee in her Second Supplemental Report dated November 17, 1992. She again determined that even in the light most favorable to plaintiff, the affidavit still did not establish material issues of fact sufficient to defeat defendants' motion.

I refused to consider the misdated affidavit because it was never filed with the Clerk of the Court pursuant to Fed.R.Civ.P. 5(e), and therefore was not part of the record as required for de novo review under Fed.R.Civ.P. 72(b). Order at 8-9. I did, however, consider the substance of the September 14 affidavit, which was drafted with the benefit of the guidance provided by Magistrate Judge Lee's Original Report and Recommendation. Viewing the affidavit in the light most favorable to plaintiff, I agreed with Magistrate Judge Lee that "its failure to pierce the pleadings made it inadequate to defeat the defendant's motions." Id. The affidavit made nothing more than "conclusory assertions of fact" that repeat the pleadings. Id. No new information had been submitted to the Court that would have suggested that plaintiff would be able to pierce the pleadings and establish a genuine issue of material fact. See id. at 9-10 (citing cases). Repetition of arguments that have received full consideration fails to constitute a genuine ground for 60(b)(1) relief. Peterson v. Valenzo, 803 F.Supp. 875, 877 (S.D.N.Y.1992), aff'd, 996 F.2d 303 (2d Cir.1993).

The complex saga encompassing plaintiff's affidavits is one of many factors suggesting that plaintiff has interfered with the adversary process and has consequently failed to prosecute under Fed.R.Civ.P. Rule 41(b). [FN2] Plaintiff's belief that the dismissal for failure to prosecute was unwarranted because the original affidavit was "promptly re-executed" belies reality. Sandler Aff. ¶ 12. Even if LeFrere received the affidavit in January, counsel fails to explain adequately why the affidavit was not filed with the Clerk of the Court. See, e.g., F.R.Civ.P. Rule 5(e); Local General Rule 1(a); Local Civil Rules 1(b), 3(a)-(c). Counsel cannot shift the responsibility for the failure to file to his secretary. The New York Code of Professional Responsibility provides, in part:

> *6 A lawyer often delegates tasks to clerks, secretaries, and other lay persons. Such delegation is proper if the lawyers maintains a direct relationship with the client, supervises the delegated work, and has complete professional responsibility for the work product.

New York Code of Professional Responsibility, Ethical Canon 3-6 (1990). That seven months, a missed Status Conference, and two reports by a Magistrate Judge passed before counsel re-executed the affidavit suggests that counsel's supervision over his client, his staff, and this case was lacking. I also note that when counsel re-executed the affidavit in August 1992, he again disregarded proper procedural rules by sending the affidavit to Judge Wood's Chambers rather than to the Clerk of the Court. The result of this action was a gross waste of the time and the resources of Magistrate Judge Lee, who issued two supplemental reports in less than eight weeks because she was, understandably, unaware of the existence of the re-executed affidavit at the time of her first supplemental report.

The failure to comply with the discovery schedule established by Judge Wood also justifies the conclusion that plaintiff failed to prosecute the case. In fact, the Second Circuit has held that failure to participate in discovery justifies denial of a 60(b) motion. Salomon at 128 (citing Sieck v. Russo, 869 F.2d 131, 134-35 (2d Cir.1989)). See also

Maduakolam at 56 (same). Plaintiff suggests that its failure to participate in discovery was in the interests of judicial economy. Plaintiff states that because defendant Gregory had not yet been served, "any depositions in his absence would have been a nullity as to him and would have had to be repeated." Sandler Aff. ¶ 6. This statement overlooks the fact that Gregory was not present in the litigation because plaintiff ignored Judge Wood's repeated instructions to serve a complaint on Gregory in a timely manner. Plaintiff's second justification for failing to participate in discovery, that somehow discovery had been stayed definitely because of the LeFrere's letter to Judge Wood, is also inadequate to warrant 60(b) relief. The letter does speak of postponing the trial date pending resolution of the summary judgment motion. Pl.Ex. C. However, the letter makes absolutely no reference to the discovery timetable. Id. Regardless, the letter of a pro se defendant does not render the timetable established by Judge Wood irrelevant.

Finally, plaintiff's counsel offers absolutely no explanation for missing a scheduled Status Conference. Nor does plaintiff explain why it failed to serve a defendant despite being instructed to do so by Judge Wood. In short, plaintiff's actions display an inexcusable pattern of obstruction of the adversary process. Although the Second Circuit affords "extra leeway" to pro se defendants who fail to meet procedural requirements, such protection does not extend to plaintiffs who are represented by counsel. Enron Oil at 95-96. Plaintiff has failed, as a matter of law, to establish any valid reason for invoking this Court's extraordinary powers under Rule 60(b).

CONCLUSION

*7 For the reasons stated above, plaintiff's motion for reconsideration of my Order of July 15, 1993 is DENIED, and the Clerk of the Court is instructed to enter judgment in favor of defendants and dismissing this action with prejudice.

SO ORDERED.

FN1. Sandler claims that this date is a mistake and should read January 14, 1992.

FN2. For purposes of this motion I assume that plaintiff would be able to convince this Court that it should retain subject matter jurisdiction even though the main federal claim was dismissed on a summary judgment motion. 28 U.S.C. § 1367(c)(3).

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UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 2nd day of December, one thousand nine hundred and ninety-four.

PRESENT: HONORABLE GEORGE C. PRATT,
HONORABLE PIERRE N. LEVAL,
HONORABLE GUIDO CALABRESI, Circuit Judges.

- x

ULF W. RUNQUIST, as Trustee of RUNQUIST & CO., INC. PROFIT SHARING TRUST,

Plaintiff-Appellant,

- against -

Docket No. 94-7284

DELTA CAPITAL MANAGEMENT, L.P.,

Defendant,

JOHN M. LeFRERE & WILLIAM H. GREGORY,

Defendants-Appellees.

- x

This appeal from a judgment of the United States District Court for the Southern District of New York, Sonia Sotomayer, Judge, came on to be heard on the transcript of record and was argued by counsel for plaintiff-appellant and by defendant-appellee John M. Lefrere, pro se.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the judgment appealed from is hereby **reversed and remanded.**

Plaintiff Runquist alleged in his complaint that he had purchased a limited partnership interest in Delta Capital Management, L.P. ("Delta") in reliance upon false representations made by Delta's general partners, pro se defendants John LeFrere and William Gregory. Specifically, the complaint alleges that LeFrere and Gregory had furnished plaintiff with written materials, which they had prepared, that included a "confidential" offering memorandum stating that Delta did not intend to invest more than 50% of its total assets in any one industry, or more than 25% of its assets in the securities of any issuer. In reliance on that

reopened already

memorandum, Runquist invested $750,000, his life savings, in Delta. Unfortunately for him, at the time of his investment, more than 75% of Delta's assets were invested in securities of First Executive Corp., a company which has since suffered severe financial reversals, and whose stock is now virtually worthless.

Runquist asserted violations of federal securities laws as well as state-law claims of breach of fiduciary duty, negligence, and common-law fraud. On December 3, 1991, LeFrere moved for partial summary judgment on the ground that Runquist could not prove reliance.

Judge Kimba M. Wood referred the motion to Magistrate Judge Barbara E. Lee. On February 20, 1992, Magistrate Judge Lee established April 6, 1992, as the deadline for Runquist's submission of papers in opposition to the summary-judgment motion. Runquist filed no papers by that deadline. On August 17, 1992, Magistrate Judge Lee issued her first report and recommendation, which concluded that plaintiff: (1) had completely failed to demonstrate reliance, an essential element of his case; (2) had not arrived at a scheduled status conference; (3) had not served the complaint on defendant Gregory in a timely manner, despite repeated instructions by Judge Wood; (4) had failed to engage in discovery within the time frame established by Judge Wood; and (5) had failed to "oppose LeFrere's timely motion for summary judgment". Magistrate Judge Lee recommended dismissing the fraud claim against LeFrere for failure to show a triable issue as to reliance; she further noted that "the absence of reliance * * * is fatal to plaintiff's [federal] claims against all defendants". In addition, she recommended dismissal under F.R.C.P. 41(b) of the pendent state common-law claims against all defendants for failure to prosecute under F.R.C.P. 41(b).

On August 28, 1992, Runquist filed objections to the report and moved for reconsideration before the magistrate judge. Focusing on the magistrate judge's statement that plaintiff had failed to oppose the summary judgment motion, plaintiff's counsel alleged that he had drafted an affidavit in opposition to the motion in December 1991; that he had discussed the affidavit with Runquist on January 2-3, 1992, but later learned it was never filed with the clerk because of a disgruntled secretary who had left his firm's employment in January 1992. He attached to the motion for reconsideration what purported to be a copy of the unfiled affidavit. The copy was not signed, but the attorney represented that the affidavit would be re-executed upon Runquist's return from Sweden the next day, August 29, 1992.

In a supplemental report and recommendation dated September 24, 1992, Magistrate Judge Lee considered a submitted affidavit execut-

ed by Runquist on September 14, 1992. That affidavit differed substantially from the draft affidavit attached to Runquist's August 28, 1992, motion for reconsideration. Magistrate Judge Lee concluded that the new affidavit failed to establish a genuine dispute over a material issue of fact. She also found that plaintiff's "lame excuses" for continued delay were insufficient to warrant modification of the prior recommendation to dismiss the state common-law claims for failure to prosecute.

Runquist renewed his objections and filed another motion for reconsideration before the magistrate judge. That motion contained an affidavit identical to the draft attached to the August 28th motion. Runquist claimed that this affidavit had been sent to Judge Wood's chambers on or about August 31, 1992; however, the affidavit was not filed with the clerk and was not part of the record considered by the magistrate judge. Curiously, Runquist's signature purported to have been notarized in New York on August 28, 1992, which was one day prior to Runquist's return from Sweden, according to his attorney's affidavit included in the August 28th motion. (The attorney later explained that, in notarizing his client's affidavit, he had simply made a mistake as to the date.)

On November 17, 1992, Magistrate Judge Lee issued a second supplemental report and recommendation. She determined that even with his latest affidavit Runquist still had failed to establish a material issue of fact. She also adhered to her earlier recommendation to dismiss the remaining claims for failure to prosecute.

On July 19, 1993, Judge Sotomayer, to whom the case had been reassigned, rejected Runquist's objections, adopted the second supplemental report and recommendation of Magistrate Lee, and dismissed the entire complaint.

Runquist's motion for reconsideration and for relief from the judgment under F.R.C.P. 60(b) was denied on February 16, 1994.

Runquist raises two issues on appeal: (1) whether the affidavits and exhibits submitted to the district court raise a triable issue of fact on his fraud and reliance claims under federal law; and (2) whether the district court abused its discretion by dismissing all of the remaining claims under rule 41(b).

A. Summary Judgment

When a district court reviews objections to a magistrate judge's report and recommendation for summary judgment, it must

make a de novo determination of the motion "upon the record, or after additional evidence". Fed. R. Civ. P. 72(b); see also 28 U.S.C. § 636(b)(1)(c). Here we look at the entire record as it was before the district court.

The August 28th affidavit, submitted to the magistrate judge in draft form on the first motion for reconsideration and subsequently submitted in executed form, raised triable issues of fact as to whether defendants had misrepresented Delta's investment plan to Runquist and whether Runquist reasonably relied on those misrepresentations. In his motion for summary judgment, LeFrere attempted to show that Runquist could not have relied on any misrepresentation by defendants, asserting that Runquist had been provided with substantial information concerning Delta's investment practices prior to signing the subscription agreement. These allegations were directly countered by Runquist's August 28th affidavit. If the August 28th affidavit were considered, it is apparent that summary judgment would be inappropriate.

The question, then, is whether the district court should have considered the August 28th affidavit. By the time the matter came before the district court, Runquist had submitted a signed and sworn copy of the affidavit, albeit one bearing a questionable date. Runquist also had submitted both his sworn statement, contained in his September 14th affidavit, that he had in fact sworn to an affidavit identical to the August 28th affidavit when it was originally presented to him in January 1992, and a copy of a receipt from the notary public who notarized Runquist's signature on January 2, 1992. It was apparent that any failure either to oppose LeFrere's original summary judgment motion or to file the August 28th affidavit properly in the first instance was attributable to counsel's manifold shortcomings, rather than to Runquist's default. We do not condone counsel's numerous missteps. Simple adherence to the Federal Rules of Civil Procedure would have avoided the need for numerous motions for reconsideration and additional explanatory affidavits. However, under the particular circumstances of this case, where the plaintiff himself has repeatedly taken timely action to present evidence to the court, we believe that, given our well-established preference that cases be decided on the merits, the August 28th affidavit should have been considered and summary judgment should have been denied.

B. Dismissal for Lack of Prosecution

Runquist also contends that the district court's rule 41(b) dismissal of his remaining claims was an abuse of discretion.

Rule 41(b) provides:

> For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or any claim against the defendant. Unless the court in its order for dismissal otherwise specifies a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits.

Although this rule speaks of dismissal on a defendant's motion, a district court may also act on its own motion, Schenck v. Bear, Stearns & Co., 583 F.2d 58, 60 (2d Cir. 1978), as it did in this case. We have noted, however, that "dismissal [for failure to prosecute under 41(b)] is a 'harsh remedy to be utilized only in extreme situations.'" Alvarez v. Simmons Mkt. Research Bureau, Inc., 839 F.2d 930, 932 (2d Cir. 1988) (quoting Thielmann v. Rutland Hosp., 455 F.2d 853, 855 (2d Cir. 1972)). Our standard of review for such dismissals under Rule 41(b) is abuse of discretion. Schenck, 583 F.2d at 60.

We assess a rule 41(b) dismissal in light of the record as a whole, considering the following factors: (1) the duration of the plaintiff's failures; (2) whether the plaintiff had received notice that further delays would result in dismissal; (3) whether the defendant is likely to be prejudiced by further delay; (4) whether the district judge has taken care to strike the balance between alleviating court calendar congestion and protecting a party's right to due process and a fair chance to be heard; and (5) whether the judge has adequately assessed the efficacy of lesser sanctions. Harding v. Federal Reserve Bk. of New York, 707 F.2d 46, 50 (2d Cir. 1983).

Applying these factors to the record in this case, we conclude that the district court should not have dismissed these claims. There is no doubt, of course, that the failures of Runquist's attorney were many and continued over several months. However, the district court did not discuss the possible efficacy of other, lesser sanctions, a factor to which we have attached particular importance. See Schenck, 583 F.2d at 60 (stating that "[t]he sound exercise of discretion requires the judge to consider and use lesser sanctions in the appropriate case"). Moreover, it is conceded that no express warning that further inaction would result in the termination of the case was given before dismissal.

We understand and sympathize with the district court's frustration in dealing with the repeated inadequacies of Runquist's counsel. We think, however, that, despite counsel's many failings, the imposition of the harsh sanction of dismissal, without warning and without considering the efficacy of lesser sanctions, was excessive in the circumstances of this case.

The judgment of the district court is reversed and the case is remanded for further proceedings.

George C. Pratt, U.S.C.J.

Pierre N. Leval, U.S.C.J.

Guido Calabresi, U.S.C.J.

BOLT ELECTRIC, INC., Plaintiff,
v.
The CITY OF NEW YORK and Spring City Electrical Manufacturing Co., Defendants.

No. 93 CIV. 3186(SS).

United States District Court, S.D. New York.

March 23, 1994.

OPINION AND ORDER

SOTOMAYOR, District Judge.

*1 Pursuant to Fed.R.Civ.P. 12(b)(6), defendant, the City of New York ("NYC"), moves to dismiss the amended complaint in this diversity action for contract nonpayment. Defendant NYC contends that the alleged contract at issue is unenforceable because it does not comply with NYC statutory and regulatory requirements, and because it violates public policy. For the reasons discussed below, defendant's motion is granted.

Background

Plaintiff, Bolt Electric, Inc. ("Bolt"), is a New Jersey corporation which seeks payment for lighting and related materials it designed or supplied for a reconstruction project of the Eastern Parkway in Brooklyn, New York ("the Project"), supervised by the Department of Transportation ("DOT"). In 1987, after a competitive sealed bidding process, NYC awarded Naclerio Contracting Co., Inc. ("Naclerio"), a 58.7 million dollar contract for the Project ("the Contract").

At issue in the instant motion before me are outstanding payments for materials ordered by Naclerio from Bolt in February 1988 and October 1991. The February 1988 purchase order included materials which Bolt claims it specially designed for the Project. The subsequent October 1991 purchase order included several of the February 1988 materials, as well as certain new items. It is unclear how much payment Bolt received for the materials in these purchase orders.

Bolt also contracted with L.K. Comstock & Company, Inc. ("Comstock"), a Naclerio electrical subcontractor under the Contract, to supply lighting materials for the Project. Bolt claims that these materials were specifically required under the Contract. NYC, however, was not a party to either agreement between Bolt and Naclerio, or Bolt and Comstock.

The Naclerio Contract with NYC was ill-fated. As time passed, the Project fell further and further behind schedule and was delayed several years. As the Project languished, Naclerio's financial status also grew tenuous and, in 1990, Naclerio filed for bankruptcy protection. [FN1] Naclerio did not pay Bolt or Comstock during 1990 and 1991, and both informed NYC of their respective nonpayment problems with Naclerio. Eventually, in 1991, Comstock informed NYC that it was withdrawing from the Project because of nonpayment.

Naclerio thereafter requested that Bolt provide the lighting materials it had ordered. Despite the existing and potential nonpayment problems, Bolt agreed to continue with the Project on two conditions. First, Bolt demanded full payment for outstanding debts on materials it had already provided. Second, it wanted NYC to guarantee payment of all remaining materials.

Although it is unclear whether Naclerio complied with Bolt's first condition, Bolt claims that it continued producing the Naclerio items because NYC met its second condition by providing a guarantee of payment. Bolt alleges this guarantee is commemorated in a letter dated September 25, 1991, from DOT Deputy Commissioner Bernard McCoy ("the McCoy Letter").

*2 The McCoy Letter states, in pertinent part, that:

> [a]ll conforming material ordered by Naclerio on their Purchase Order with [Bolt] will be paid to Naclerio by the City of New York.
>
> In the event Naclerio Contracting Co., Inc. defaults in its contract with the New York City Department of Transportation, the Department will purchase from Bolt Electric, Inc. all materials ordered specifically for the Eastern Parkway contract.

Affidavit of Gilman J. Hallenbeck ("Hallenbeck Affidavit"), Exhibit H.

Relying upon the McCoy Letter as a guarantee, Bolt accepted another purchase order from Naclerio

for over two million dollars of lighting materials, including materials previously ordered but which Bolt had refused to deliver due to nonpayment problems. Bolt states that some of the materials included in this order had previously been inspected and approved by NYC. Bolt also continued to prepare and deliver other materials for the Project.

Bolt learned, during the summer of 1992, that NYC might declare Naclerio in default. According to Bolt, at a meeting with NYC officials in August 1992 and at subsequent meetings, NYC officials "assured Bolt that even if Naclerio was released and a new general contractor was brought on board, NYC would honor its commitment to purchase from Bolt the materials ordered by Naclerio." Bolt's Memorandum of Law in Opposition to Defendant the City of New York's Motion to Dismiss ("Bolt's Memorandum"), p. 9. The NYC officials also instructed Bolt to continue working on the Project. Id.

Naclerio's default was indeed imminent and, in October 1992, the NYC declared Naclerio in default. Bolt maintains that at another meeting on October 26, 1992, with several NYC officials, including DOT Assistant Commissioner Lawrence Gassman and DOT chief lighting official Steve Galgano, NYC again explicitly directed Bolt to continue work on the materials ordered by Naclerio and on new materials not previously ordered. Bolt claims that, with the McCoy Letter in his hand, DOT Assistant Commissioner Gassman assured Bolt that "the City will honor its commitment to you," id. at 10, and Bolt, again relying on these assurances, continued to produce the requested items.

After the declaration of Naclerio's default, NYC decided to complete the Project by submitting it to the Project's surety, Aetna Casualty & Surety Company ("Aetna"). Although Aetna hired subcontractors other than Bolt to work on the Project materials, Bolt alleges that Aetna promised that Bolt would continue to serve as the electrical materials supplier of the Project and that the NYC guarantee in the McCoy Letter would be honored. Notwithstanding these assurances, on February 12, 1993, the Project's new electrical subcontractor notified Bolt that it was no longer on the Project. Defendant Spring City was ultimately selected to supply the materials previously contracted by Naclerio in the October 1991 purchase order. [FN2]

In the case before me, Bolt seeks $2,592,746.20 for payments due under the February 1988 and October 1991 purchase orders, which Bolt contends NYC is bound to pay pursuant to the guarantee set forth in the McCoy Letter. Bolt also claims that in reliance on NYC's assurances of payment, Bolt released its liens against Naclerio and Comstock for prior purchase orders, and, at NYC's request, withdrew its third-party complaint against NYC in an Ohio lawsuit against Bolt, filed by one of its suppliers for expenses associated with the Project. Hallenbeck Affidavit, ¶¶ 27-28.

*3 Defendant NYC moves to dismiss Bolt's complaint against it, arguing that there is no legally viable agreement between NYC and Bolt which requires NYC to pay for the items in the purchase order. Initially, NYC argued that a municipal contract is valid and legally binding only if it complies with the express statutory requirements of competitive sealed bidding or the statutorily recognized alternatives to the sealed bidding process. NYC contends that because Bolt never participated in the bidding process, or otherwise complied with alternative procurement prerequisites, the McCoy Letter cannot constitute a valid contract with NYC. Also, a contract which does not satisfy the statutory prerequisites, according to NYC, is a nullity because it violates NYC's laws and rules and, hence, contravenes public policy.

At the oral argument on the extant motion, held October 23, 1993, NYC conceded that the bidding requirement was not absolute and that it could be avoided in certain situations, including when a contractor defaults. Transcript of October 23, 1993 Hearing, pp. 3-4; 7; 9. [FN3] However, NYC asserted that even in the case of a default, it may circumvent the bidding requirement only after it has formally declared the contractor in default. The timing of the default announcement, NYC argued, is dispositive and anything preceding the announcement is without legal significance unless it complies with the statutory bidding prerequisites.

A consistent theme of NYC's arguments is that, ultimately, any contract which has not satisfied the applicable statutory requirements is invalid as against public policy. Defendant NYC's public policy argument may be summarized succinctly as

alleging that the statutory restrictions on a municipality's right to contract cannot be ignored or avoided because they are fundamental to "responsible municipal government." Thus, public accountability, according to NYC, is paramount.

Bolt responds that the McCoy Letter did not have to comply with bidding requirements or any alternative contracting process, and that NYC's "official" declaration of Naclerio's default is irrelevant to whether NYC agreed to pay Bolt for the materials ordered for the Project. Bolt also argues that if I determine that some approval was required in order for NYC to enter a valid procurement agreement with Bolt, I should overlook such a requirement on purely equitable grounds because there is no proof of "fraud, collusion or other impropriety in the execution of the [McCoy Letter]." Bolt's Memorandum, p. 22. Bolt further contends that it is unfair to deny recovery against NYC where Bolt has acted in good faith and upon reliance of NYC's assurances.

DISCUSSION

A. The Motion to Dismiss for Failure to State a Claim

Dismissal pursuant to Fed.R.Civ.P. 12(b)(6) is warranted only where "it appears beyond doubt that the plaintiff can prove no set of facts in support of [the plaintiff's] claim which would entitle [the plaintiff] to relief." Ricciuti v. New York City Transit Auth., 941 F.2d 119, 123 (2d Cir.1991), quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957) (footnote omitted). The issue "is not whether a plaintiff will ultimately prevail, but whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974). In considering the motion, the allegations in the complaint must be construed favorably to the plaintiff. Walker v. New York, 974 F.2d 293, 298 (2d Cir.1992), cert. denied, 507 U.S. 961, 113 S.Ct. 1387, 122 L.Ed.2d 762 (1993).

*4 Defendant NYC does not challenge Bolt's interpretation of the McCoy Letter, but rather, for purposes of this motion, NYC accepts the proposition that a contract between DOT and Bolt existed. Memorandum of Law in Support of City's Motion to Dismiss the Amended Complaint ("NYC's Memorandum"), pp. 1-2. NYC argues that because the McCoy Letter does not comply with mandatory statutory requirements, however, it is an unenforceable contract, either because it is statutorily invalid or because it violates public policy. [FN4]

NYC agrees that there are two categories of valid contracts exempt from the competitive bidding requirement. The first category is best described as contracts which are formed in accordance with alternative methods to competitive bidding explicitly set forth in the Charter, like the non-bidding process for emergency procurements. See New York City Charter § 315. Since the parties agree that the alleged contract between Bolt and NYC does not come within the coverage of any of these alternative mechanisms, there are no viable arguments that the McCoy Letter satisfies these sections of the New York City Charter ("Charter"). [FN5]

The second category of bid-exempt contracts includes contracts which are valid if they are a consequence of a default of a contractor, and entered into in order to complete the work under a contract which has been previously submitted for bidding. See N.Y.C. Administrative Code § 6-102(b) (1992). The McCoy Letter arguably falls within this category. Id.; see also Contract, Article 48.

Nevertheless, regardless of whether the contracts were formed in accordance with recognized alternative nonbidding procedures, or as a consequence of a default, all NYC contracts must satisfy certain approval procedures set forth in the Charter, New York City's Administrative Code ("the Administrative Code") and the Procurement Policy Board Rules ("PPB Rules").

As discussed below, NYC's mandatory approval requirements and public policy claims are its most defensible and compelling arguments. Any agreement or contract with Bolt, in furtherance of the Contract and for purposes of completion of the Project, must satisfy the requirements set forth in NYC's rules and regulations. These requirements are alternatives to the competitive sealed bidding process which, though theoretically less burdensome, are mandatory and cannot be waived. Since the McCoy Letter does not comply with these statutory requirements, NYC argues it is invalid and to recognize such a contract would violate public policy. I agree.

1. Declaration of Default as a Municipal Contract Prerequisite

New York State's General Municipal Law § 103.1 requires that contracts for public works must be awarded to the lowest bidder.

> Except as otherwise expressly provided by an act of the legislature or by a local law adopted prior to September first, nineteen hundred fifty-three, all contracts for public work involving an expenditure of more than seven thousand dollars and all purchase contracts involving an expenditure of more than five thousand dollars, shall be awarded by the appropriate officer, board or agency of a political subdivision or of any district therein ..., to the lowest responsible bidder furnishing the required security after advertisement for sealed bids in the manner provided by this section....

*5 N.Y. GEN. MUN. LAW § 103.1 (McKinney 1986). [FN6]

The Charter specifically states that all City procurement contracts shall be awarded pursuant to a competitive bidding process initiated by NYC's issuance of an invitation for bids. Interested bidders submit sealed bids and NYC awards the contract to the lowest responsible bidder. New York City Charter § 313. However, as already stated, and as NYC recognizes, the bidding process is not inviolate or mandatory in all cases. See United States v. City of New York, 972 F.2d 464, 471-72 (2d Cir.1992) (New York City Charter includes valid exceptions to the traditional state law requirement that New York City bid all its contracts). The Charter provides for methods of awarding procurement contracts, without use of the bidding procedure, see e.g., New York City Charter § 312 (exceptions to the procurement process), § 315 (emergency procurement), § 317 (alternatives to competitive sealed bidding), and, as the parties agree, under the Contract here, NYC could complete the work without rebidding, if Naclerio defaulted.

Bolt argues that since NYC could contract without bidding to complete the work after Naclerio's default, it has the authority, as a matter of law, to enter into an agreement, such as the McCoy Letter, to pay for the Project materials. NYC counters that a formal declaration of a default is a prerequisite to the valid formation of a municipal contract to complete the work under the defaulted contract.

I am not persuaded that NYC cannot act on what ultimately is its discretionary authority to complete the Contract, in anticipation of a default, simply because it has not yet formally declared a default. To hold otherwise would place an unwarranted and unjustified burden on NYC from invoking its discretion--discretion which appears otherwise unencumbered. Cf. In re Matter of Leeds, 53 N.Y. 400, 403 (1873) (readvertising may be inappropriate where it causes an injudicious delay); City of New York v. Palladino, 146 A.D. 850, 131 N.Y.S. 807, 809 (1st Dept.1911) (readvertising for contract to collect refuse not required, in part, where accumulating refuse was menace to the public).

Despite the total absence in the General Municipal Law, the Administrative Code or the Contract of any time provision of the sort NYC proposes, NYC requests that I read into these sources a requirement that a formal declaration of default must precede any attempts to secure the means by which to complete the work under the contract. Such an interpretation is unwarranted and unjustified by the plain language of the law or the Contract which permits NYC to complete the Contract "by such means and in such manner" as it deems desirable. See Article 48. NYC must be free to react in potentially urgent situations, like securing specially-designed materials or the services of a subcontractor, prior to a default. Otherwise, NYC would bear an unnecessary risk in the completion of its defaulted contracts.

*6 Defendant NYC relies on the language of Article 48 of the Contract to support its argument that the bidding-circumvention provisions found in this Article are triggered only once a default is actually declared and the contractual notice requirements are followed. Article 48, in relevant part, states simply that the Commissioner of the Department of Highways of the City of New York,

> after declaring the Contractor in default, may then have the work completed by such means and in such manner, by contract with or without public lettings, or otherwise, as he may deem advisable, utilizing for such purpose such of the Contractor's plan, materials, equipment, tools and supplies remaining on the site, and also such subcontractors, as he may deem advisable.

This language alone is insufficient to support NYC's conclusion that its discretion is limited. This Article addresses only the actual act of

completing the Contract, it does not state that NYC could not take, pre-default, actions to facilitate such completion.

In fact, the language of the Contract clearly provides that if the contractor defaults, NYC may complete the work "by such means and in such manner" as advisable. Thus, the Contract grants NYC broad discretion in furtherance of completing the work, without any prohibition on NYC from agreeing, pre-default, to pay Bolt for the undelivered Project materials should Naclerio default. Nothing therein suggests that the notice requirements which exist, in part, for the benefit of the contractor, also prohibit NYC from acting in anticipation of a default, without bidding.

2. Comptroller Requirements on All Municipal Contracts

The ability to exercise discretion to complete work without rebidding before or upon a default does not, however, relieve the City and contractors from complying with other legal obligations and requirements. NYC maintains that any contracts or agreements not submitted for bidding, must still comply with other statutory requirements set forth in the Charter, the Administrative Code and the PPB Rules. These requirements mandate that contracts be filed and registered with the NYC Comptroller prior to their implementation. NYC's Memorandum, pp. 14-22.

Three provisions control in the instant case. First, Charter § 328(a) states:

> Registration of contracts by the comptroller. a. No contract or agreement executed pursuant to this charter or other law shall be implemented until (1) a copy has been filed with the comptroller and (2) either the comptroller has registered it or thirty days have elapsed from the date of filing, whichever is sooner, unless an objection has been filed pursuant to subdivision c of this section, or the comptroller has grounds for not registering the contract under subdivision b of this section. (emphasis added) [FN7]

Thus, all contracts and agreements are effective only upon filing and registration with the Comptroller. See Prosper Contracting Corp. v. Board of Educ. of the City of New York, 73 Misc.2d 280, 341 N.Y.S.2d 196, aff'd, 43 A.D.2d 823, 351 N.Y.S.2d 402 (1st Dept.1974).

*7 Second, § 6-101 of the Administrative Code states, in relevant part:

> Contracts; certificate of comptroller. a. Any contract, except as otherwise provided in this section, shall not be binding or of any force, unless the comptroller shall indorse thereon the comptroller's certificate that there remains unexpended and unapplied a balance of the appropriation or fund applicable thereto, sufficient to pay the estimated expense of executing such contract, as certified by the officer making the same.
>
> * * *
>
> c. It shall be the duty of the comptroller to make such indorsement upon every contract so presented to him or her, if there remains unapplied and unexpended the amount so specified by the officer making the contract, and thereafter to hold and retain such sum to pay the expense incurred until such contract shall be fully performed. Such indorsement shall be sufficient evidence of such appropriation or fund in any action.
>
> d. The provisions of this section shall not apply to supplies, materials and equipment purchased directly by any agency pursuant to subdivisions (c) and (d) of section three hundred [twenty nine] of the charter. [FN8] (emphasis added)

By reference to Charter §§ 329(c) and (d), § 6-101 excludes any small purchases such as direct agency purchase of goods in amounts not exceeding $1,000 in costs per transaction, or, upon the prior approval of the Commissioner of General Services or the Mayor's approval, an amount not exceeding $5,000. The $5,000 limit may only be increased with the additional approval of the Comptroller. These increases must be published in the City Record.

Lastly, PPB Rule § 5-07(b) provides that:

> [n]o contract or agreement executed pursuant to the New York City Charter or other law shall be effective until:
>
> (1) The Comptroller has registered the contract or thirty (30) days have elapsed from the date of filing, during which the Comptroller has neither raised an objection pursuant to subdivision (i) below nor refused to register the contract pursuant to subdivision (h) below. (emphasis added)

These sections establish that, with the exception of contracts for goods costing small amounts, clearly

not the situation in Bolt's case, NYC and its agencies cannot unilaterally enter contracts or agreements absent approval by or registration with the Comptroller.

Recognizing the extent of NYC's discretion and the need for flexibility, especially under exigent circumstances, does not equate with discarding statutory and regulatory requirements governing NYC contracts. In accordance with New York law, even if NYC chose to proceed with Bolt under the Naclerio Contract, before or after the default, the McCoy Letter would not be enforceable unless it satisfied all requirements which govern contracts awarded by other than the competitive sealed bidding process.

Bolt argues, and NYC concedes, that a mere irregularity or technical violation of statutory requirements does not prohibit recovery on a quasi-contract basis. See, e.g., Ward v. Kropf, 207 N.Y. 467, 101 N.E. 469 (1913) (contractors can recover under a quasi-contract analysis where local entity failed to comply with legal requirement that the maximum and minimum cost of improvement be stated in proposition to electors, in order to avoid unjust enrichment by local entity for benefit received from actual services provided); Littlefield-Alger Signal Co. v. County of Nassau, 43 Misc.2d 239, 250 N.Y.S.2d 730 (Sup.Ct. Nassau Co.1964) (low bidder is entitled to recover for the services it provided even though contract is invalid because county executive failed to execute it where defendant received a benefit from the services and there is no offense to public policy). However, even quasi-contract recovery is unavailable where "the making of the contract flouted a firm public policy or violated a fundamental statutory restriction upon the powers of the municipality or its officers...." Cassella v. City of Schenectady, 281 A.D. 428, 120 N.Y.S.2d 436, 440 (3rd Dept.1953) (citing McDonald v. Mayor, 68 N.Y. 23, 28; Seif v. City of Long Beach, 286 N.Y. 382, 36 N.E.2d 630 (1941); Brown v. Mt. Vernon Housing Auth., 279 A.D. 794, 109 N.Y.S.2d 392 (2d Dept.1952); 6 WILLISTON, CONTRACTS (rev. Ed.) § 1786A; 2 Restatement, Contracts § 598).

*8 The Bolt case is not a case of a mere technical failure in executing an otherwise valid contract. As discussed below, the Bolt contract clearly violates New York's public policy against recognizing agreements by municipal agents who act without authority to contract on behalf of the municipality. See McDonald v. Mayor, 68 N.Y. 23 (1867).

3. NYC's Public Policy Claim

New York's public policy is clear that municipal contracts or agreements which do not satisfy all of its procurement requirements are neither valid nor enforceable. In New York, a municipality's authority to contract is strictly limited statutorily. Henry Modell & Co. v. City of New York, 159 A.D.2d 354, 355, 552 N.Y.S.2d 632, 634 (1st Dept.) (citing Genesco Entertainment, A Div. of Lymutt Industries, Inc. v. Koch, 593 F.Supp. 743, 747-48 (S.D.N.Y.1984), appeal dismissed, 76 N.Y.2d 845, 559 N.E.2d 1288, 560 N.Y.S.2d 129 (1990). The restrictions exist to "protect the public from the corrupt or ill-considered actions of municipal officials." Id. It is well established that a municipal contract which violates express statutory provisions is invalid. Granada Bldgs., Inc. v. City of Kingston, 58 N.Y.2d 705, 708, 444 N.E.2d 1325, 1326, 458 N.Y.S.2d 906, 907 (1982) (citations omitted). Thus, where municipal agents act without authority, any contract formed is without legal validity. Id. According to the court in Modell,

> "where there is a lack of authority on the part of agents of a municipal corporation to create a liability, except by compliance with well-established regulations, no liability can result unless the prescribed procedure is complied with and followed."

Id., quoting Lutzken v. City of Rochester, 7 A.D.2d 498, 501, 184 N.Y.S.2d 483 (4th Dept.1959).

Moreover, to accord legal validity to a contract which fails to comply with the statutory mandates is contrary to public policy. As stated in Genesco,

> [t]o allow recovery under a contract which contravenes [statutory restrictions on a municipal corporations's power to contract] gives vitality to an illegal act and grants the municipality power which it does not possess "to waive or disregard requirements which have been properly determined to be in the interest of the whole."[ ]

Genesco, 593 F.Supp. at 747-48 & n. 14, quoting Lutzken, 7 A.D.2d at 499, 184 N.Y.S.2d at 486.

The alleged agreement with NYC contravenes

public policy because it does not comply with NYC's registration and filing requirements, critical components of a process designed, in part, to avoid corruption, to ensure sufficient appropriations for municipal contracts and to protect against fiscal excess. Cf. Cassella v. City of Schenectady, 281 A.D. 428, 120 N.Y.S.2d 436, 440 (3rd Dept.1953) (plaintiff cannot recover in quasi-contract where local Civil Service Commission failed to certify plaintiff for appointment as fire surgeon, where invalidity is based on irregularity or technical violation because contract flouts firm public policy, and contract violates a fundamental statutory restriction upon powers of municipality or its officers). In the Bolt case, the Comptroller's oversight is exactly the type of monitoring of a financially strapped project envisioned by the legislature, for, as the parties concede, the Project had exceeded its expected completion schedule and expenses. Thus, concerns over financial viability, which are fundamental aspects of municipal contracts, were practical realities of the Project. Thus, the manner in which the Bolt contract was formed undermines the very purpose of the municipal law in failing to have the Comptroller, the entity responsible for the monitoring of the fiscal integrity of NYC projects, certify and approve the agreement.

B. Bolt's Estoppel Claims and Request for Relief

***9** Bolt contends that since the McCoy Letter is not tainted by any impropriety chargeable to Bolt, however, that I should recognize NYC's promises and assurances for payment of the Project materials. Bolt maintains that it acted completely in good faith and upon reliance of NYC's assurances when it withdrew liens against Naclerio and Comstock, and dismissed third-party claims against NYC in pending litigation. Bolt's allegations, in essence, are complaints that NYC acted in a devious manner in seeking Bolt's abandonment of these legal claims and that, therefore, NYC should be estopped from asserting mandatory compliance with the statutory and regulatory prerequisites as a defense to this litigation.

Generally, estoppel is not available in New York against public entities for the unauthorized acts of their agents. Granada, 58 N.Y.2d at 708, 444 N.E.2d at 1326, 458 N.Y.S.2d at 907 ("because a governmental subdivision cannot be held answerable for the unauthorized acts of its agents ..., we have frequently reiterated that estoppel is unavailable against a public agency.") (citations omitted).

The estoppel rule is based, in part, on New York's public policy which charges those bargaining with municipalities with the burden of determining the contracting authority of municipal representatives. Those dealing with NYC must ascertain the extent of the municipal agent's authority and must be aware of the statutory and regulatory requirements applicable to municipal contracts. McDonald, 68 N.Y. 23. A party bargains or contracts with a municipality at its own risk and bears the burden of being informed of the applicable procedures and requirements. Modell, 159 A.D.2d 354, 552 N.Y.S.2d at 634; Gill, 152 A.D.2d at 914, 544 N.Y.S.2d at 395 (citing 27 NY JUR 2D, Counties, Towns and Municipal Corporations, §§ 1217, 1218). Cf. Parsa v. State of New York, 64 N.Y.2d 143, 147, 474 N.E.2d 235, 237, 485 N.Y.S.2d 27, 29 (1984) ("A party contracting with the State is chargeable with knowledge of the statutes which regulate its contracting powers and is bound by them.") (citations omitted). As clearly stated by the First Department, "those dealing with municipal agents must ascertain the extent of the agents' authority, or else proceed at their own risk." Modell, 159 A.D.2d 354, 552 N.Y.S.2d at 634, citing Genesco, 593 F.Supp. 743.

Bolt is responsible for knowing the extent of DOT's authority, as well as the limits of that authority in entering any agreements on behalf of NYC. See id. In this case, as already fully discussed, the statutory and regulatory prerequisites were never satisfied. Those requirements are clearly set forth in the Charter, Administrative Code and the PPB Rules--public documents which are available to those who contract with NYC agencies and employees. The alleged promises or assurances by NYC contained in the McCoy Letter are not enforceable merely because Bolt claims it was treated unfairly. Bolt may seek payment from other responsible parties, such as Naclerio or Comstock. What it cannot do is demand that NYC pay for Project materials, pursuant to an agreement which is not valid under the law, or as a public policy matter.

***10** Moreover, under New York law, a party cannot recover on an invalid contract or in quantum

meruit. S.T. Grand, Inc. v. City of New York, 32 N.Y.2d 300, 305, 298 N.E.2d 105, 108, 344 N.Y.S.2d 938, 942 (1973). New York recognizes an exception to this harsh rule of complete forfeiture in cases where the plaintiff "entered into the contract in good faith, the contract does not violate public policy, and the circumstances indicate that the municipality would be unjustly enriched." Gill, Korff, and Associate, Architects and Engineer, P.C. v. County of Onondaga, 152 A.D.2d 912, 914, 544 N.Y.S.2d 393, 395 (4th Dept.1989) (citing Vrooman v. Village of Middleville, 91 A.D.2d 833, 834-35, 458 N.Y.S.2d 424 (4th Dept.1982), appeal denied, 58 N.Y.2d 610, 449 N.E.2d 427, 462 N.Y.S.2d 1028 (1983). While Bolt relies on cases which have held that recovery is possible where these mitigating factors exist, these factors do not exist in the case before me.

For example, in Vrooman v. Village of Middleville, 91 A.D.2d 833, 834-35, 458 N.Y.S.2d 424, 426 (4th Dept.1982), the court held that the plaintiff could recover, even though the contract was unenforceable for failure to comply with a statutory requirement that the Commissioner of Health be a party to the contract, because there was no violation of public policy and the village benefited from plaintiff's services. The court concluded that the contract did not violate the public policy against extravagance and collusion because the State had mandated the local project and because the services provided by the plaintiff "were essential to effectuate [the State's] directive." Id. at 426. To excuse the local entity from any liability, where the local entity clearly benefited from plaintiff's services, would "encourage disregard of the statutory safeguards by municipal officials." Since there was no harm to the taxpayers the court determined that recovery was appropriate. [FN9]

The Bolt case is different. As noted previously, the agreement here violates a clearly established public policy. The filing and registration requirements were essential checks on the financial stability of the Project--a Project financially overextended and with a tenuous fiscal status--to ensure that NYC and the taxpayers where not overpaying for services or committing otherwise unavailable City dollars. In direct contrast to Vrooman, the instant case presents a situation where recognizing the municipal agreement could result in NYC paying twice--first to the main contractor Naclerio or the surety, and then to Bolt. This "harm" to the taxpayers is exactly what the municipal legislation intends to avoid.

Also, unlike Vrooman, NYC did not benefit from essential services provided by the plaintiff. Indeed, it is unclear how much of the Bolt materials were actually provided to the Project. Lastly, I cannot agree that the concern in Vrooman over judicially encouraged official circumvention of statutory requirements, is relevant to the instant case. Since there was no clear "benefit" which accrued to NYC or DOT, this case does not present a situation wherein illegal or inappropriate conduct results in unjust enrichment or a windfall for the municipality.

*11 The other cases cited by Bolt are similarly unconvincing and distinguishable. See Shaddock v. Schwartz, 246 N.Y. 288, 294, 158 N.E.2d 872, 874 (1927) (Cardozo, C.J.) (plaintiff may recover based on a moral obligation to pay the reasonable value for work performed, despite drafting error in its bid for public contract, where there is no injury to the City's fisc and the City actually benefited by accepting the bid since it was the lowest); Gladsky v. City of Glen Cove, 563 N.Y.S.2d 842, 846 (2d Dept.1991) (plaintiff may recover, pursuant to its agreement with the municipality, for expenses, such as title examination costs, incurred in reliance on the contract for sale of real property); Albert Elia Bldg. Co. v. New York State Urban Development Corp., 54 A.D.2d 337, 344-45, 388 N.Y.S.2d 462, 468 (4th Dept.1976) (where competitive bidding statutes were violated, contractor's good faith and lack of fraud, collusion or wrongdoing by the State mitigates against the harsh remedy of contractor's full forfeiture and, instead, contractor must refund the difference between the costs for work done and an estimated bidding price for the work); Galvin v. New York City Housing Auth., 78 Misc.2d 312, 315, 356 N.Y.S.2d 942, 946 (Sup.Ct. N.Y. Co.1974) (absent collusion between Housing Authority and contractor, Housing Authority may negotiate modifications to contract without public bidding for a new contract).

Bolt's unsupported allegations that NYC acted in a deceptive manner to induce it to release NYC, Naclerio and Comstock from liability does not alter my decision. In its opposing memorandum, Bolt accuses DOT officials of acting "somewhat deviously, it now appears" in directing Bolt to abide

by the promises in the McCoy Letter, and encouraging it to withdraw its claim against NYC in the Ohio lawsuit. Bolt also charges that, in direct reliance of NYC's guarantees of payment, Bolt released liens on the purchase orders against Naclerio and Comstock. See Hallenbeck Affidavit, ¶¶ 27-28. NYC raises serious questions as to the veracity and accuracy of these claims, and argues that what Bolt is seeking in this litigation is lost profits, not the costs for goods supplied to NYC. For example, NYC states that Bolt has received a $100,000 payment from Comstock for supplies for the Project and that NYC has not received any items for which Bolt now seeks payment.

Assuming, as I must on a motion to dismiss, that NYC acted in a deceptive manner, Bolt's allegations are still without sufficient support to withstand the motion to dismiss. [FN10] Bolt's conclusory statements setting forth a tale of deceit fail to set forth conduct so unconscionable on the part of NYC so as to warrant avoiding the usual prohibition on estoppel in cases involving municipalities. As discussed above, this is certainly not the case where the actions of the municipal representatives are so egregious that they have tainted the entire contractual bargaining process, or where the municipality is accorded a windfall based on deceptive actions by its representatives. [FN11]

*12 I also note that, although Bolt has made unsupported allegations of injury and loss attendant to its withdrawal of legal claims, based on NYC's false statements, Bolt's submissions suggest otherwise. For example, Bolt's withdrawal of the liens against Naclerio and Comstock is without prejudice to refile, and, apparently, since the suit is still pending in Ohio, there has not been a judgment issued against Bolt. See Hallenbeck Affidavit, Exhibit G.

Conclusion

For the reasons stated, defendant the City of New York's motion to dismiss the amended complaint for failure to state a cause of action as a matter of law, as against the City of New York, is GRANTED and the Clerk of the Court is directed to enter judgment dismissing the amended complaint against this defendant. The amended complaint otherwise stands against the remaining defendant, Spring City.

The claims against the City of New York are separate and distinct from the claims involving Spring City, and there being no just reason for delay of entry of a final judgment, I order that final judgment be entered in favor of defendant the City of New York and that the Order be certified pursuant to Fed.R.Civ.P. 54(b).

SO ORDERED.

FN1. Judge Cornelius Blackshear of the United States Bankruptcy Court for the Southern District of New York dismissed Naclerio's bankruptcy petition on January 5, 1993.

FN2. Plaintiff claims that it provided defendant Spring City certain crucial information about the design of its materials and the bid price, which Spring City then improperly used to obtain the work assignment under the Contract. Amended Complaint ¶¶ 23-26. Defendant Spring City is not a party to the instant motion and I do not consider the claims against it at this time.

FN3. The Contract established that once NYC declared Naclerio in default, NYC could complete the contract without proceeding through the competitive sealed bidding process. NYC admitted that in the case before me, it had, in fact, chosen to complete the Project by submitting it directly to the surety. Transcript of October 23, 1993 Hearing, pp. 3-4, 9. Consequently, any argument that bidding for the Bolt contract was mandatory is without support.

FN4. Defendant NYC argues, however, that even if one assumes the existence of a valid contract between NYC and Bolt, the only appropriate permissible interpretation of the McCoy Letter is that NYC promised to pay Naclerio for delivered goods or, in the case of a default, to pay Bolt, for unpaid, undelivered materials.

FN5. In November 1989, the New York City Charter abolished the Board of Estimate, effective January 1990. Under the 1989 Charter, New York City's Mayor and appointed officials approve awards of contracts which have not gone through the competitive bidding process. This Charter provision predated NYC's September 1991 McCoy Letter to Bolt.

FN6. General Municipal Law § 103.1 has been amended to increase the contractual price of contracts subject to the bidding process. The last such amendment, effective January 1, 1992, raised the contract amount to $20,000 for public contracts and $10,000 for purchase expenditures. This amendment does not affect the case before me since its effective date postdates the formation of the contracts at issue here and the outstanding debts to Bolt for the February 1988 and October 1991 purchase orders clearly exceed the monetary requirements under the amendment.

FN7. Section 328 became effective under the 1989 Charter on September 1, 1990. Subdivisions (b) and (c) do not apply to the case before me.

FN8. According to the Charter's historical notes, § 344 was renumbered § 329, effective September 1, 1990. However, § 6-101(d) of the Administrative Code continues to refer to Charter §§ 344(c) and (d) rather than § 329. For purposes of clarity, my Opinion refers to § 329 not 344.

FN9. The court also noted that, by ordering the preparation of the plans for the project and subsequently approving the plaintiff's plans, the Commissioner of Health had acted sufficiently in compliance with the statutory requirement to be a party to the contract. Vrooman v. Village of Middleville, 91 A.D.2d 833, 835, 458 N.Y.S.2d 424, 426 (4th Dept.1982).

FN10. On the present record, Bolt's allegations of intentional deceptive conduct by NYC appear suspect. Notably, Bolt's submissions to this Court contradict its claim that NYC deceived Bolt into withdrawing legal action against NYC. The correspondence from Bolt's vice president, Gilman J. Hallenbeck, for example, fails to lend credence to Bolt's claims of fraudulent inducement regarding the Ohio lawsuit. Bolt Electric had New York City dismissed as a defendant [in the Ohio lawsuit] as a courtesy since the Corporation Council had assured Bolt that New York City was aware of the problem Bolt was experiencing and the City was going to do everything in its power to solve the problem. Gilman J. Hallenbeck Affidavit, Exhibit G, Hallenbeck's Letter to Commissioner Chris Ann Halpin, Department of Highways, dated October 1, 1992.

FN11. I do not decide here whether Bolt reasonably relied on NYC's assurances. Arguably, any such reliance on NYC's statements as to payment in accordance with the McCoy Letter is not reliable because Bolt was bound to ascertain the authority to make such promises and should have known that the alleged agreement set forth in the McCoy Letter was invalid for failure to comply with the legal requirements discussed fully in this Opinion.

END OF DOCUMENT

EUROPEAN AMERICAN BANK, Appellant,
v.
Dolores BENEDICT, a/k/a Dolores Cogliano, Appellee.

94 CIV. 7110 (SS).

United States District Court, S.D. New York.

July 17, 1995.

Helfand & Helfand, New York City, for appellant; Bruce H. Babitt, of counsel.

Finkel Goldstein Berzow & Rosenbloom, New York City, for appellee; Neal M. Rosenbloom, Gary I. Selinger, of counsel.

AMENDED OPINION AND ORDER [FN1]

SOTOMAYOR, District Judge.

*1 European American Bank ("EAB" or "appellant") appeals from an Order dated July 21, 1994 (the "July Order") by the Honorable Francis G. Conrad of the United States Bankruptcy Court for the Southern District of New York. Pursuant to Fed.R.Civ.P. 60(b) and Fed.R.Bankr.P. 9024, the July Order vacated an earlier Order of the bankruptcy court dated March 11, 1994 (the "March Order"), which had extended EAB's time to file a complaint against Dolores Benedict ("Benedict" or "appellee") declaring Benedict's guarantee obligation to EAB nondischargeable under § 523 of the Bankruptcy Code (11 U.S.C. § 523). [FN2] In addition, the July Order barred EAB from prosecuting a complaint objecting to Benedict's discharge or to the dischargeability of the obligation, and discharged appellee's obligation to EAB. For the reasons discussed below, I affirm the July Order of the bankruptcy court.

BACKGROUND

At issue in this appeal is whether EAB is barred from challenging the dischargeability of a loan it made to appellee's company, Cogliano Benedict Photographics Inc., which loan Benedict personally guaranteed. Benedict filed a Chapter 11 bankruptcy petition on April 13, 1993; the deadline to file complaints objecting to the discharge of debts under § 523(c) was set for August 23, 1993. Debts set forth in § 523(a), including debts for fraud, are excepted from discharge in bankruptcy. Section 523(c), however, specifies that some of these nondischargeable debts, including debts for fraud, will be discharged unless the creditor timely requests the bankruptcy court to determine the dischargeability of the debt. In order to conduct discovery to test whether Benedict had procured the loan fraudulently, EAB timely moved to extend its time to file a complaint under § 523(c). The bankruptcy court granted a 30-day extension.

On or about September 1, 1993, appellee converted her Chapter 11 case to one under Chapter 7. The conversion notice to creditors indicated that the new deadline under Bankruptcy Rule 4007(c) for the filing of complaints to contest the dischargeability of debts was January 10, 1994. [FN3]

EAB maintains that despite its repeated attempts from September through November 1993 to obtain documents and examine appellee, Benedict refused to comply with EAB's discovery demands. EAB moved on November 18, 1993 to compel discovery and to require Benedict's attendance at a Rule 2004 examination, or alternatively, to dismiss the bankruptcy case (the "November Motion"). The motion's return date was set for December 20, 1993, three weeks before the January 10, 1994 Rule 4007(c) deadline. At the request of Benedict's counsel, however, the return date of the motion was adjourned until February 7, 1994. EAB did not move for an extension of time to file its complaint objecting to the dischargeability of the debt owed to it.

On January 11, 1994, the day after the 4007(c) deadline passed, appellant and appellee met. Benedict agreed to reaffirm EAB's debt under § 524(c) (the "Reaffirmation"), and stipulated to extend EAB's time to object to the discharge of its debt should she later rescind the Reaffirmation (the "Stipulation"). Upon being advised of the Reaffirmation, the bankruptcy court scheduled a hearing for February 7, 1994, later adjourned to March 3, 1994. After holding a Reaffirmation Hearing of the nonrepresented debtor, Judge Conrad indicated, without specifying his reasons on the record, that he would not approve the Reaffirmation or Stipulation. He also asked whether a meeting of creditors had been held and whether the 60 days had

expired with respect to objections to discharge. EAB's counsel replied, "It will expire, I believe, next week sometime." (Tr. March 3, 1994 at 3). Judge Conrad directed EAB's counsel to submit an order extending EAB's time to file a complaint under § 523 through June 20, 1994, and signed the Order on March 11, 1994.

*2 Appellee thereafter obtained new counsel, who objected to the March Order, contending that it was untimely as it was entered after January 10, 1994. New counsel moved to have the March Order vacated as it was signed under a mistake of fact. In addition, appellee rescinded the Reaffirmation and Stipulation. At a hearing held on June 28, 1994, Judge Conrad agreed that he had signed the March Order extending EAB's time to file a complaint under the mistaken impression that the deadline for filing had not already passed. On July 21, 1994, Judge Conrad vacated the March Order pursuant to Fed.R.Civ.P. 60(b) [FN4] and ordered EAB not to file and prosecute a complaint objecting to appellee's discharge or the dischargeability of the obligation. In so doing, the bankruptcy court rejected EAB's argument that its motion to compel discovery should have been deemed a motion to extend time under 4007(c). This appeal followed.

DISCUSSION

This court has jurisdiction to hear this appeal from the bankruptcy court pursuant to 28 U.S.C. § 158(a). On an appeal from an order of the bankruptcy court, the bankruptcy court's legal conclusions are reviewed de novo and its findings of fact are accepted unless clearly erroneous. See, e.g., In re Manville Forest Products Corp., 896 F.2d 1384, 1388 (2d Cir.1990).

Appellant argues that the bankruptcy court erred in two ways: first, by reading EAB's November Motion to compel discovery as not including a motion to extend the Rule 4007(c) deadline; and second, by refusing to recognize the Reaffirmation and Stipulation agreed to by the parties, and later rescinded by appellee.

1. EAB's November Motion

EAB argues that a request for an extension of time to file a § 523 complaint was implicit in its November Motion to compel discovery, because its need for additional time in which to secure documents and conduct a § 2004 examination should have been apparent to the bankruptcy court. Benedict responds that the bankruptcy court could not have construed the November Motion as a request for an extension to file a complaint, because a request for a 4007(c) extension must be explicit.

EAB relies on In re Sherf, 135 B.R. 810 (Bankr.S.D.Tex.1991) and In re Lambert, 76 B.R. 131 (E.D.Wis.1985), for its position that the bankruptcy court should have construed the November Motion as implicitly including a motion for an extension of time; Benedict relies on In re Kennerley, 995 F.2d 145 (9th Cir.1993), to counter that position. These cases are not binding authority on this court, although they are apparently the only precedent that discusses whether motions that do not explicitly request extensions under Rule 4007(c) may be construed as including such requests.

In Sherf, 135 B.R. 810, creditors filed an "objection" to dischargeability, which was served on the debtors. Thereafter, the clerk's office informed the creditors that they needed to file a complaint objecting to discharge, not merely an "objection." The creditors then timely served a complaint objecting to debtor's discharge, but neglected to file the complaint properly because they did not obtain a separate case number or pay a filing fee. The creditors were not informed of their mistakes until after the Rule 4007(c) deadline. The bankruptcy court held that a pleading filed before the Rule 4007(c) bar date that puts the debtor on notice as did the creditor's "objection" could be treated as a motion to extend time for filing a complaint. 135 B.R. at 815.

*3 Unlike the "objection" and the served but not filed complaint in Sherf, however, the November Motion to compel discovery here did not mention the filing of a complaint under § 523, nor did it even mention objections to discharge or dischargeability. The November Motion did not give any notice to appellee or the court as did the objection and the actual complaint served but not filed in Sherf.

In the second case relied on by appellant, Lambert, 76 B.R. 131, creditors moved the bankruptcy court for relief from a stay to permit them to pursue misrepresentation claims in state

court. Included with the motion for termination of the stay was a copy of a complaint the creditors intended to file in state court. The court construed the motion for relief from a stay as one for an extension of time for filing a complaint to determine dischargeability of a debt and allowed the state court action to proceed. In upholding the ruling by the bankruptcy court, the district court noted that the order was "consistent with the principles behind the bankruptcy law, which preclude a debtor from escaping liability for fraudulent actions." 76 B.R. at 132. The district court discussed no caselaw in its decision, and the decision was not appealed to the Seventh Circuit.

The Ninth Circuit, however, criticized Lambert in Kennerley, 995 F.2d 145. In Kennerley, the bankruptcy court had barred a fraud action from proceeding against the debtor because the creditor had failed to file a timely complaint of nondischargeability, and the district court had reversed the bankruptcy court's order. The Ninth Circuit reversed the district court, rejecting the creditor's argument that his motion to lift the automatic stay should be considered a motion to extend the deadline under Rule 4007(c). Quoting what it termed the "well-reasoned decision" of the bankruptcy court, the Ninth Circuit emphasized, " '[Creditor's] motion for relief from the automatic stay did not request an extension of the deadline; it did not mention the deadline'.... In fact, the motion does not even mention Rule 4007 or § 523(c)." Id. at 147. In addition, the Kennerley court noted that Lambert conflicts with Ninth Circuit caselaw, which strictly construes Rule 4007(c). Id.

I am persuaded by the reasoning in Kennerley. Like the motion in Kennerley, EAB's November Motion did not request an extension of the dischargeability bar date, nor did it mention Rule 4007 or § 523(c). The bankruptcy court had no cause to scrutinize the November Motion to conclude that EAB might be asking for other forms of relief it had not requested, given the specificity of the notice of motion, which reads in part:

> NOTICE OF MOTION FOR AN ORDER TO COMPEL DISCOVERY AND REQUIRE DEBTOR'S ATTENDANCE AT EXAMINATION AND/OR IN THE ALTERNATIVE TO DISMISS THE DEBTOR'S BANKRUPTCY CASE
>
> PLEASE TAKE NOTICE that upon the annexed motion (the "Motion") and proposed order of European American Bank ("EAB") by its counsel, Helfand & Helfand, will move this court ... for an order pursuant to Rule 45 of the Federal Rules of Civil Procedures [sic] made applicable by Rules 2004, 2005 and 9016 of the Federal Rules of Bankruptcy Procedure, to compel the debtor to permit discovery and require the Debtor to appear and be examined and/or in the alternative to dismiss the Debtor's bankruptcy case pursuant to Bankruptcy Code § 707(a)(1) and Bankruptcy Rule 2003.

*4 Given the particularity of this notice of motion, EAB's contention that the bankruptcy court should have assumed that the motion sought an extension of time to object to dischargeability is unreasonable. Moreover EAB, a bank represented by counsel, had brought a specific motion for a deadline extension in the superseded Chapter 11 case; Judge Conrad had no reason to believe that EAB would not do the same in the Chapter 7 action, if EAB was seeking that relief. Finally, the November Motion was filed approximately seven weeks in advance of the 4007(c) deadline; there was no reason for the bankruptcy court to think that counsel for EAB would not subsequently file a timely motion for an extension if it perceived a need to do so. See Kennerley, 995 F.2d 145, 147 (9th Cir.1993) (creditor's motion for relief from automatic stay should not be considered a request for an extension of the deadline; "[a]t the time the motion was filed, the deadline was some six weeks in the future, and plenty of time remained for [creditor] to file a timely dischargeability complaint").

The Ninth Circuit's reasoning in Kennerley is also consistent with the conclusion of other circuits that have held Rule 4007(c) to be a strict statute of limitations. See, e.g., In re Themy, 6 F.3d 688, 689 (10th Cir.1993) (Rules 4007(c) and 9006(b)(3) "prohibit a court from sua sponte extending the time in which to file dischargeability complaints"); In re Alton, 837 F.2d 457, 459 (11th Cir.1988) ("There is 'almost universal agreement that the provisions of F.R.B.P. 4007(c) are mandatory and do not allow the Court any discretion to grant a late filed motion to extend time to file a dischargeability complaint.' "); In re Pratt, 165 B.R. 759, 761 (Bankr.D.Conn.1994).

I too find the "strict statute of limitations" view of Rule 4007(c) to be consistent with the language of

the Rule and its legislative history. The current Bankruptcy Rules, promulgated in 1983 and amended thereafter, eliminated the discretion of the bankruptcy courts in setting dischargeability deadlines. For example, former Rule 409(a) provided that the bankruptcy court set the deadline for filing a complaint objecting to dischargeability "not less than 30 days nor more than 90 days after the first date set for the first meeting of creditors...." Current Rule 4007 removes the discretion of the bankruptcy court by statutorily fixing a 60 day period to file dischargeability complaints. In addition, the bankruptcy court's discretion to extend deadlines also has been eliminated: Former Rule 409 provided that the bankruptcy court "may for cause shown, on its own initiative or on application of any party in interest, extend the time for filing a complaint objecting to discharge." Current Rules 4007 and 9006 eliminate the court's authority to extend deadlines sua sponte; Rule 4007(c) provides that, in order to extend the bar date, "[t]he motion shall be made before the time has expired," and Rule 9006(b)(3) provides that enlargement of time under 4007(c) may be obtained "only to the extent and under the conditions stated in those rules." See, e.g., In re Klein, 64 B.R. 372, 374-75 (Bankr.E.D.N.Y.1986).

*5 While the limitations on a court's ability to set and extend deadlines does not directly address appellant's argument that its November Motion should be construed as including a request for an extension, I agree with the reasoning in Kennerley that a broad reading of the November Motion that would construe a motion to compel discovery as a motion to extend the deadline for filing a dischargeability complaint would be inconsistent with the overall strict interpretation which should be accorded to Rule 4007(c). [FN5]

Appellant further argues that the bankruptcy court should have extended the dischargeability complaint deadline under its general authority granted in § 105(a) of the Code, which allows the court to act to prevent an abuse of the bankruptcy process. Appellant relies on In re Greene, 103 B.R. 83 (S.D.N.Y.1989), aff'd without opinion, 904 F.2d 34 (2d Cir.1990), cert. denied, 498 U.S. 1067 (1991), in which the district court upheld the bankruptcy court's use of § 105(a) to extend the deadline for objections to dischargeability. The facts in Greene, however, are decidedly different from the situation here.

The Greene court extended the filing deadline for a creditor who was neither included on the creditor list nor had actual notice of the bankruptcy, unlike EAB, who was properly notified of appellee's filing of bankruptcy. Moreover, the Greene court was persuaded that the appellants before it were not honest debtors, but rather, had attempted to use the process "for purposes other than a good-faith effort to secure a fresh start." Id. at 88. Here, on the other hand, despite repeated cries by EAB of foul play on the part of appellee, Judge Conrad stated when granting appellee's motion to vacate the March Order, "The facts here cannot lead me to the conclusion that counsel for the bank has made here, that the Debtors have some sort of unclean hands." Tr. June 28, 1994 at 26. As the district court is bound to the bankruptcy court's findings of fact unless they are clearly erroneous, see, e.g., In re Manville Forest Products Corp., 896 F.2d 1384, 1388 (2d Cir.1990), I accept Judge Conrad's finding of the lack of bad faith on the part of appellee.

EAB further argues that its earlier deadline extension in appellee's Chapter 11 case and its discovery requests put Benedict on notice that EAB intended to object to the dischargeability of the obligation owed it. It is important to bear in mind that notice is not the only purpose of the Bankruptcy Rules. Instead, the Rules are intended to serve other goals, among them, "the prompt closure and distribution of the debtor's estate," Pioneer, 113 S.Ct. at 1495, and the promotion of "the expeditious and efficient administration of bankruptcy cases by assuring participants in bankruptcy proceedings 'that, within the set period of 60 days, they can know which debts are subject to an exception to discharge,' " Rockmacher, 125 B.R. at 384 (quoting In re Sam, 894 F.2d 778, 781 (5th Cir.1990)). While the operation of the Rules may lead in some cases to harsh results, "[t]he bankruptcy system simply could not operate if every deadline, which by its nature can cut off someone's lawful rights, could be contested on equitable grounds." In re Collins, 173 B.R. 251, 254 (Bankr.D.N.H.1994).

2. Rescission of Reaffirmation and Stipulation

*6 EAB also argues that the Bankruptcy Court acted arbitrarily in overlooking the Reaffirmation

and Stipulation entered into by the parties on January 11, 1994, the day after the deadline passed for EAB to file an objection to appellee's discharge or the dischargeability of debts owed it. In the Stipulation, appellee agreed to extend EAB's time to object to dischargeability should she rescind the Reaffirmation. Benedict later rescinded both the Reaffirmation and Stipulation.

EAB's argument is specious. It provides no legal authority for the novel proposition that litigants, through a stipulation, can bypass a court's exercise of its obligation to decide whether cause exists to extend a statutorily controlled deadline. See, e.g., In re Snyder, 102 B.R. 874, 875 (Bankr.S.D.Fla.1989) ("[T]his court will not permit litigants to bind this court, by bargaining for delay beyond that specified by the Rules and the Code"). Judge Conrad did not abuse his discretion by refusing to recognize the Stipulation.

CONCLUSION

For the reasons stated above, I affirm the Order of the bankruptcy court dated July 21, 1994, case no. 93-B-41894 (FGC), and direct the Clerk of the Court to enter judgment accordingly.

SO ORDERED.

FN1. The substance of this Amended Opinion and Order is identical to the Opinion and Order issued on June 26, 1995; the changes in this Amended Opinion and Order are technical only and do not alter the legal conclusions of my previous Order.

FN2. Unless otherwise specified, all statutory references are references to the Bankruptcy Code, Title 11 of the United States Code. All references to "Rules" are references to the Federal Rules of Bankruptcy Procedure.

FN3. Rule 4007(c) mandates: A complaint to determine the dischargeability of any debt pursuant to § 523(c) of the Code shall be filed not later than 60 days following the first date set for the meeting of creditors.... On motion of any party in interest, after hearing on notice, the court may for cause extend the time fixed under this subdivision. The motion shall be made before the time has expired.

FN4. Fed.R.Civ.P. 60(b) provides: On motion and upon such terms as are just, the court may relieve a party or party's legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake....

FN5. Appellant does not argue that his failure to file for an extension of the Rule 4007(c) deadline was a result of "excusable neglect," presumably because most courts have interpreted Rule 9006(b)(3) as eliminating the possibility that a deadline may be extended under 4007(c) because of excusable neglect. See, e.g., In re Rockmacher, 125 B.R. 380, 383 (S.D.N.Y.1991) (when dealing with extensions of time under Rule 4007(c), "the excusable neglect standard of rule 9006(b)(1) is explicitly excepted from consideration by rule 9006(b)(3)"); In re Savage, 167 B.R. 22, 27 (Bankr.S.D.N.Y.1994) (Bankruptcy Rule 9006(b)(3) does not make allowance for excusable neglect); In re Figueroa, 33 B.R. 298, 300 (Bankr.S.D.N.Y.1983) ("It is clear that by prohibiting that which it formerly permitted, Congress intended to no longer subject the preeminent fresh start policy to the uncertainties of excusable neglect in failing to timely object to discharge of a claim"). Accord Pioneer Inv. Serv. Co. v. Brunswick Assoc. Ltd. Partnership, 113 S.Ct. 1489, 1495 (Supreme Court explained that existence of excusable neglect doctrine for filing late claims in Chapter 11 cases but not in Chapter 7 cases reflects the different policies of the two chapters: "Whereas the aim of a Chapter 7 liquidation is the prompt closure and distribution of the debtor's estate, Chapter 11 provides for reorganization with the aim of rehabilitating the debtor and avoiding forfeitures by creditors.").

END OF DOCUMENT

SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
PART TWO, QUESTION 4

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002. form	RE: Financial Statement (4 pages)	02/27/1997	P6/b(6)

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RESTRICTION CODES

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P1 National Security Classified Information [(a)(1) of the PRA]
P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
P3 Release would violate a Federal statute [(a)(3) of the PRA]
P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
P5 Release would disclose confidential advice between the President and his advisors, or between such advisors [a)(5) of the PRA]
P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

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b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

SOTOMAYOR RESPONSE TO SENATE QUESTIONNAIRE
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